FEB 21 1955
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 609

HENRY S. CATO,
Petitioner

vs.

CYRUS E. SILLING, SR.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Henry S. Cato prays that a writ of certiorari issue to reverse the judgment of the Supreme Court of Appeals of West Virginia, entered in the above-entitled case on November 22, 1954.

CITATIONS TO OPINIONS BELOW

The oral opinion of the Court of Common Pleas of Kanawha County, West Virginia rendered in directing the jury to find a verdict against petitioner and in favor of respondent, upon the third jury trial, is unpublished and is printed at [1]App. 55. The opinion of the Supreme

1. App. ..... refers to the page of the Appendix to this Petition, which is contained in a separate volume; R ..... refers to the page number of the record transmitted herewith, as paged by the Clerk below; Code .... refers to Michie's 1949 Code of West Virginia, Chapter, Article and Section. All emphasis herein is by counsel, unless otherwise noted.

Court of Appeals of West Virginia, following the second jury trial of the case, printed at App. 14, is reported in 73 S.E. 2d 731. The two refusals of the Supreme Court of Appeals of West Virginia to grant a writ of error to petitioner following the third jury trial are printed at App. 48, but are otherwise unpublished.

JURISDICTION

The judgment of the Court of Common Pleas of Kanawha County in directing a verdict in favor of respondent at the third jury trial was entered on the 21st day of July, 1953, App. 45. The refusal of the Circuit Court of Kanawha County, West Virginia to grant a writ of error to the judgment entered upon that directed verdict was entered by order on the 18th day of March, 1954, App. 47. The refusal of the Supreme Court of Appeals of West Virginia to grant a writ of error upon the first application by petitioner was entered on the 27th day of September, 1954, App. 48. The refusal of the Supreme Court of Appeals of West Virginia to grant a writ of error to petitioner upon second application was entered on the 22nd day of November, 1954, App. 49.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3) permitting review by certiorari of a State Court decision involving the construction of a Federal statute, or where any rights or privileges specially claimed under the Constitution of the United States were denied. The stage of the proceedings, and the manner in which the Federal questions sought to be reviewed, were raised in the courts below, are set out hereinafter under the heading "How and When the Federal Questions Arose".

QUESTIONS PRESENTED

1. Did not the Supreme Court of Appeals of West Virginia erroneously interpret a Federal statute when it

held that the Housing and Rent Act of 1947, as amended, did not provide any civil remedy, or create any cause of action, for the recovery of damages by the tenant for his wrongful eviction by his landlord from premises occupied by such tenant, in willful and direct violation of that Act and the lawful order of the Rent Director?

2. When a tenant in lawful possession of his tenancy was wrongfully evicted therefrom, in direct violation and in disregard of the Federal Housing and Rent Act of 1947, as amended, the lawful orders of the Rent Director, and in violation of the statutes of West Virginia, without any notice or hearing, and without his day in court, whereby the tenant suffered substantial personal injury and property damage, was the tenant not unconstitutionally deprived of his rights and property without due process of law, when the highest court of West Virginia refused to permit him any redress therefor?

STATUTE INVOLVED

The statute involved is the Housing and Rent Act of 1947, Chapter 163, 61 Stat. 193, as amended by the Act of March 30, 1948, Chapter 161, 62 Stat. 93, and the Act of March 30, 1949, Chapter 42, 63 Stat. 18, 50 USCA Appendix, Sections 1881 to 1910, in effect in March 1950, App. 1, and the eviction provisions made April 1, 1949 by the Office of the Housing Expediter, under the Controlled Housing and Rent regulations printed in the Federal Register of April 5, 1949, App. 8. Also involved is the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

Facts

Wallace B. Allen and his wife, Clara Williams Allen, leased for a period of three years, from the Staunton Estate, a large dwelling place at 1216 Kanawha Boule-

vard, on the corner of Morris Street, Charleston, W. Va., beginning in the year 1942. Mr. and Mrs. Allen resided in the residence, and leased rooms to sub-tenants.

Late in the year 1944, respondent, Cyrus E. Silling, Sr., a prominent architect, together with an associate, purchased the property. Later, in 1948 or 1949, respondent purchased the interest of his associate and became the sole owner of the property.

Mrs. Allen's husband becoming disabled, she continued with the lease and at its expiration in 1945, held over on a yearly basis.[2] Petitioner, Henry S. Cato, a practicing attorney of Charleston, West Virginia, and a former Judge of the Circuit Court of Kanawha County, West Virginia, was among the tenants who sub-let a room from the Allens, he beginning his sub-tenancy on April 24, 1944.

Mrs. Allen furnished his room, which had an adjoining bath, only with a gas stove, a bed and a mattress, the rest of the furniture being supplied by petitioner. Petitioner had lived in rented rooms for many years and in his room at the Allens' he had almost everything he owned, including his entire wardrobe of clothes and many other personal possessions (R-201).

Several weeks prior to January 9, 1950, respondent talked with the Rent Director (R-123) about demolishing the premises for the purpose of building an eighty-four unit apartment on the site of the residence. Later he employed John B. Fisher as his attorney to carry out the necessary legal steps to oust the tenants, so that the premises would be vacated and demolition could begin (R-144).

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2. Under the statutes of West Virginia, Code, Chapter 37, Article 6, Section 5, three months notice was required to be given to cause her to leave the premises, even though she paid on a monthly basis. App. 4.

On January 9, 1950, respondent, by his attorney, filed a petition with the Area Rent Director requesting permission to evict Mrs. Allen and her sub-tenants, and to demolish the Allen dwelling immediately, and for waiver of the three-months period before he could obtain possession for that purpose (R-156).

That petition stated that a contract for construction had been made, material purchases were being negotiated and the earliest possible possession of the premises was necessary in order to meet construction commitments.

The petition also stated that respondent had procured proper permits issued by the City of Charleston, West Virginia, that work would begin "as soon as the present tenant and her sub-tenants can be evicted from the premises" and that it was necessary to waive the three-months waiting period "as the financial arrangements for the new construction will be jeopardized by any delay." (R-158) Petitioner protested the granting of any waiver.

On January 11, 1950, Fisher, attorney for Silling, and acting for him, filed a petition, with the Area Rent Director, in the name of Mrs. Allen. This petition was for "Decrease in Services—furniture, furnishings and equipment" and asked for permission "to remove all my furniture and fixtures and to *disconnect* all utilities from sub-tenants' accommodations effective March 1, 1950" (R-167).

This was signed by the attorney and the record (R-348, 350, 352, 358) shows that Mrs. Allen did not employ Fisher, did not pay Fisher, did not see the papers prepared and signed by Fisher, and Fisher being a reputable attorney, and being unable to accept employment from parties with adverse situations, necessarily was acting as agent for respondent, and not as attorney for Mrs. Allen in filing the petition.

At the third jury trial, respondent testified, in answer to questions by his counsel, that he had employed Fisher to see that the property was vacated and employed him to do whatever legal steps were necessary to get the property, (since he claimed he already had possession of the house, as he owned the property,) and this included the sending of "any other notices that were legally necessary" (R-329, 330).

On January 17, 1950, respondent, through his attorney, served notice on Mrs. Allen to vacate the property effective February 28, 1950.

On January 19, 1950, the Area Rent Director refused the petition of the respondent to demolish the house immediately, and ordered that "Action to remove or evict the Tenant *shall not be commenced sooner than April 11, 1950,*" and mailed copy of this order to petitioner. That certificate further stated, "Notice to Tenant—this Certificate *does not order you to move.*[3] The issuance of this Certificate *does not effect your rights at local law* under present rental agreement." (R-166)

That notice further stated, "Notice to Court and Landlord * * * If the Landlord fails to observe the provisions of this Certificate per the Rent Regulations, he is subject to civil action as provided for in the Act" (R-166).

On January 31, 1950, the Rent Director refused the petition, filed on behalf of Mrs. Allen by respondent, through his attorney, but did grant as follows:

> "Landlord may remove such furniture and *discontinue* the services of such utilities on and after March 1, 1950." (R-171)

We respectfully call to the attention of the Court that the petition filed on behalf of Mrs. Allen requested the right to "disconnect" the utilities, meaning to sever them,

3. This emphasis was contained in the original notice.

whereas the order of the Rent Director gave the right to "discontinue" the furnishing of the utilities, meaning the payment therefor, but presumably allowing the tenant to continue paying therefor (R-171). Because of the decrease in services to be rendered by Mrs. Allen, the Area Rent Director ordered that the rent be reduced from $30.00 per month to $20.50 per month, presumably to allow petitioner to pay his own utility bills and to furnish his own bed.

The petitioner, by subpoena *duces tecum*, required One Morris, Inc., a corporation, who purchased the property from respondent, to produce its books and records at the third trial, and petitioner took testimony concerning the purchase of the property and the demolition of the dwelling house. This was for the purpose of making positive proof that respondent had ousted and dispossessed petitioner, since the Supreme Court of Appeals of West Virginia had indicated doubt on this point.

The testimony showed that One Morris, Inc. was chartered in West Virginia in December 1949; the incorporators first met on January 20, 1950, and elected officers and directors; and on January 21, 1950 took under advisement respondent's offer to sell them the property in question here. On January 28th the offer was accepted and the deal with respondent was closed on February 27, 1950, as shown by the minute book of the corporation.

The evidence further showed that respondent was a minority stockholder of that corporation; that during the last week of February 1950 an unacknowledged deed, dated the 21st day of February 1950, was presented to the president of One Morris, Inc. who promptly turned it over to his lawyer, Harry Porter, for checking (R-271, 288). The deed showed that it was not acknowledged until March 13, 1950 (R-272) and was then acknowledged before Porter. The deed was then recorded on March 13,

1950, thus completing transfer, on that day, of the property from respondent to One Morris, Inc.

The president of One Morris, Inc., who gave the above testimony, stated that there were "three or four lawyers mixed up in this thing and that is their job. When they said to go ahead we went ahead, and I depended on them to give the go ahead signal" (R-283); and later stated, "I delivered this deed to Harry Porter, who was doing our title research, and he said it's OK to go ahead, and we went on from there" (R-283). The president further testified that neither he nor the corporation knew that a directive had been issued by the Federal Rent Director forbidding demolition of the property before April 11, 1950, and that at the first meeting of the stockholders on January 21, 1950, respondent made no disclosure of such a prohibition; but that the offer to One Morris, Inc. was to turn over the real estate free and clear of encumbrances (R-276, 277, 279, 284, 289).

C. H. Jimison, secretary of the corporation, was to supervise the construction of the new apartment building for a flat fixed fee, and his firm, Jimison and Sons, were agents of One Morris, Inc. to make all of the contracts necessary to do the work. Homer West was employed by Jimison and Sons (R-287). Mr. Jimison testified that he received estimates on a set of drawings from the offices of Tucker and Silling, respondent's firm, in November 1949 (R-294). He knew nothing about a prohibition to demolish the building or to refrain from removing the tenants before April 11, 1950. He made the arrangements with One Morris, Inc. to demolish the building and Homer West, his general Superintendent, signed the contract with Fike, a sub-contractor, to remove the building (R-297).

Homer West testified that he was general Superintendent for Jimison and Sons and when asked about his

duties, stated, "Well, I have full charge of all the work in this area, of the negotiations and—just more or less run the show" (R-299).

He was asked whether he negotiated with respondent, C. E. Sillings, Sr., about the demolition of the property on Kanawha Boulevard, where the big apartment building is now located, and stated, "Yes, sir, we talked about the thing." (R-299). Then he was asked when the demolition was to start and stated, "Well, *I dealt with Mr. Silling* as an architect the same as I do with any other job, and we started the job in the normal way, and *it was understood* that I was to get set up and get my temporary quarters ready and *the building would be clear and we could start the demolition around the first of March,* and that was just a general understanding." (R-300)

Then he stated that from that time on he ran his own schedule, and when asked if he had that schedule arrangement with Mr. Silling, stated (R-300), *"Well, that was our general agreement, that everybody would be out and ready to go the first of March."* He stated he knew nothing of any order from the Federal Area Rent Director restricting eviction of anyone prior to April 11th, and that he made the arrangements with Fike for the demolition of the building (R-303). He stated that later he was called and saw the room of petitioner in disarray, and it looked like he had moved out, saw drawers open and things like that (R-305).

Virgil Fike, who demolished the dwelling, testified as to his employment, and that he knew nothing of any order of the Rent Director forbidding demolition prior to April 11, 1950. Thurmond Boggess, foreman for Fike, stated he had no notice of the directive of the Rent Director, and that he moved the personal property of petitioner out of his rented room at the request and direction of Homer West.

Petitioner testified as to the injury to his health, his humiliation, and the damages to his personal property, and this was substantiated by his doctor, who testified as to the damage to his health, and by experts who testified as to the value of the property lost, destroyed or stolen by reason of the demolition.

Petitioner further testified that on March 1, when the temperature was seven above zero (R-241) he was suffering from a deep cold and fever, nearly the flu, and was resting in bed trying to break it up, (R-249) when he was advised that his electricity had been cut off (R-210), and later found the water and gas had been cut off from his room (R-235). His landlady, Mrs. Allen, testified that she gave petitioner some candles on March 1 to light his way to his room and did not know his electricity had been cut off until he so advised her (R-352). Petitioner left his room on the afternoon of March 2, leaving all of his personal property, and was attempting to get his utilities restored (R-238), became ill and did not return to the house until March 12, at which time the house was locked, and from the outside appeared to be in an advanced state of demolition on the inside (R-239, 240, 241), and he could not get to his room.

Petitioner did not get into the house until the afternoon of March 13, at which time the roof, doors, windows, etc. had been removed, the house was open and his personal property was gone, and his room demolished (R-242). When petitioner left his room on March 2, everything was the same as it had been for many years (R-265).

Petitioner, who was 73 years of age, testified that besides the injury to his health, the loss and damage to his personal property, he was greatly humiliated by this ousting and eviction from his room, and the scattering and losing of his personal effects.

After the demolition, respondent wrote petitioner,

under date of March 15, 1950, in part as follows: "Dear Judge Cato: I read in yesterday's Mail about the reported loss of your personal effects from *my* property at 1216 Kanawha Boulevard, East . . ." (R-333)

The letter further stated that respondent had visited the house and noted wearing apparel and personal property on the second floor, had caused it to be put in the garage, and stated, "If any of these items are yours, and you will advise me of your present address, *I* shall be glad to deliver them to you. I hope your new accommodations are satisfactory."

Petitioner contends that this letter, added to his other proof, is conclusive that respondent caused the damage of which petitioner complains.

On this evidence, each of two juries returned verdicts for petitioner against respondent, and included punitive damages in each. On the third jury trial, the Court of Common Pleas, at the conclusion of petitioner's evidence, directed the jury, as a matter of law, to return a verdict against petitioner, despite petitioner's protests that his federal rights were violated. (See ante)

How and When the Federal Questions Arose

Petitioner filed his action of trespass on the case against respondent in the Court of Common Pleas of Kanawha County, West Virginia on March 27, 1950, seeking to recover damages because respondent had wrongfully evicted him from his premises. Petitioner's theory, as expressed in his declaration, was that in March of 1950 respondent had evicted him from petitioner's premises in violation of an Act of Congress known as the Housing and Rent Act of 1947, its amendments then in effect, certain rules and regulations lawfully promulgated under that statute, and a violation of a specific order of the Rent Director refusing respondent the right to de-

molish the premises immediately, but requiring the usual three month waiting period, and a violation of the laws of the State of West Virginia relating to landlord and tenant (see declaration, R-14).

Respondent interposed no demurrer to the declaration, made no motion to strike it or any part thereof, made no challenge to the validity of the federal statute, its amendments or the rules and regulations promulgated thereunder, or of petitioner's right to recover for the violation of the provisions of that statute and the orders of the Rent Director lawfully issued to respondent.

Upon a jury trial of the case in the Court of Common Pleas, Kanawha County, West Virginia, a verdict was rendered in favor of petitioner in the amount of $4,900.00, of which amount $4,500.00 was for punitive damages, R-1. Thereafter the trial court, on motion, set aside the verdict and awarded respondent a new trial, on the ground that the amount of punitive damages was disproportionate to the amount of actual damages awarded by the jury, App. 13 (R-2)

At a later term of the same court, the case was again tried before a jury, which rendered a verdict in favor of petitioner in the amount of $3,300.00, $2,000.00 of which was for compensatory damages and $1,300.00 for punitive damages. Judgment was entered on the verdict (R-19) and respondent unsuccessfully sought a writ of error from the Circuit Court of Kanawha County, but was granted a writ of error by the Supreme Court of Appeals of West Virginia.

In neither of the petitions for writs of error did respondent make any claim that petitioner did not have a right of action by reason of respondent's violation of the Federal Rent and Housing Act[4]. Thereafter, the record of the second trial and the orders entered therein were

4. See respondent's petition for writ of error, R-5.

printed and are a part of the record transmitted with this instant petition, being the only printed part thereof.

The case was briefed and argued to the Supreme Court of Appeals of West Virginia, and in the printed brief of respondent, he, for the first time, alleged as error the refusal of the trial court to direct a verdict for the defendant upon the ground that the Housing and Rent Act gave no right of action to a tenant against a landlord for damages for a wrongful eviction in violation of that Act, the regulations promulgated thereunder and the specific orders of the Rent Director.

Although ordinarily the Supreme Court of Appeals of West Virginia will not consider any point of error not specifically raised below, yet in this instance that court held that this ground of error went to the basic point of jurisdiction, since it held that a violation of the Act "did not create any civil remedy, or create any cause of action, for the recovery of damages by the tenant for his wrongful eviction."

The Court held that the pleadings in any suit or action must be sufficient to sustain the judgment, and judgment rendered upon pleadings which fail to state a cause of action is erroneous.[5]

The Court further held that a pleading which does not state facts sufficient to constitute a cause of action may be challenged at any time and at any stage of the proceedings and the failure to state a cause of action is not cured by a verdict. Therefore, the Court held that it could examine the question of the sufficiency of the verdict and the validity of the judgment and determine *where the declaration stated a cause of action under the Federal statute, and held that it did not.*

Therefore, the Supreme Court of Appeals of West Virginia set aside the verdict of the jury and remanded the

5. See 73 S. E. 2d 731 at 740, App. 14.

case to the Court of Common Pleas for further proceedings.[6] Thereafter, a third trial was had before a jury in the Court of Common Pleas of Kanawha County, where for the first time this petitioner had an opportunity to raise the Federal question here sought to be reviewed and promptly so did.

A conference was held in chambers before the opening statements of counsel were made to the jury, and the following is a part of that which took place.[7]

> "MR. FISHER (of counsel for respondent): In an effort to avoid the introduction of prejudicial error into the present proceeding and to facilitate the disposition of this controversy in compliance with directives specifically set forth in the aforesaid decision of our Court of last resort, the defendant moves that the plaintiff's counsel and the plaintiff himself, inasmuch as he is an attorney * * * now be directed by Your Honor to avoid any mention of or reference to the Housing and Rent Act of 1947, as amended, and in effect before, during or since March, 1950, in their opening to the jury or in any of the evidence produced by them or in their behalf.
>
> "MR. LOPINSKY (of counsel for petitioner): Your Honor, we think that motion is highly improper and ought to be overruled, for these reasons: in the first place, *we want to make a record and certainly intend to make a record, so that in the event this Court would hold in strict conformity with the ruling of the Supreme Court, on that particular point, we might make a record so that we can go to the Supreme Court of the United States.*
>
> "THE COURT: I will let you make a record, of course, but I am not going to permit testimony

6. See 73 S. E. 2d 731, App. 14.
7. The full text being set forth at App. 49, R-188.

which the Supreme Court of Appeals has told me is not based on any proper cause of action. You are not going to get indirectly what you can't get directly. I am not going to permit that. * * * * It is not a jury question. You can vouch the record and make your record, and I want you to have a record * * *. I will sustain the objections at the time they are made, and I want counsel to understand that I do not want any violation of this, *because I think that is a Federal question.*

"MR. LOPINSKY: We want to arrange our record for that."

At the close of petitioner's testimony and after he had rested his case, counsel and the Court retired to Chambers where respondent moved the Court to strike the evidence of the petitioner and instruct the jury to return a verdict for the respondent, assigning grounds for the motion.[8]

"THE COURT: Gentlemen, *reluctant as I am to do it,* I do not understand that any evidence introduced for and on behalf of the plaintiff in this case is sufficient to take this case from without the doctrine and language of the opinion of the Supreme Court, which we have been discussing.

"MR. LOPINSKY: I want this in the record. *Does the Court hold that, based upon the Supreme Court's opinion, there is no cause of action by reason of any breach of the Federal regulation?* * * * Now, as I understand that, your Honor, the Court accepts the Supreme Court opinion—which it has to do, of course—*that the violation of the Federal statute creates no right of action?*

"THE COURT: *I do so hold, as the Supreme Court so held, that the Act 'did not provide any civil remedy or create any cause of action for the*

8. The pertinent parts are here set out, the full text being set out at App. 53, R-370.

recovery of damages by a tenant who was wrongfully evicted by his landlord.' I repeat that I do so most reluctantly, but I feel impelled * * * to sustain the defendant's motion.'

Later the Court advised the jury in part: "Gentlemen of the jury, a proper motion has been made to the Court which I am impelled to act upon, *as I see the law in this case;* * * * I am of the opinion that I must sustain that motion to direct a verdict in this case for the defendant."

Whereupon one of the jurors signed said verdict, being in the words, as follows: "We, the jury, *at the direction of the Court,* find for the defendant. (signed) Otha Stricklen, Foreman."

Upon petitioner's motion for a new trial being overruled, he filed a petition for writ of error to the Circuit Court of Kanawha County wherein the Federal questions were again specifically raised (App. 55, R-378).

Upon the refusal of that Court to grant a writ of error, petitioner filed his written petition for a writ of error with the Supreme Court of Appeals of West Virginia and again the Federal questions were raised, reiterated and presented (see App. 56, R-440).

Upon the refusal of the Supreme Court of Appeals of West Virginia to grant a writ of error, a second application was made to that court which, on the 22nd day of November, 1954, again refused to grant petitioner a writ of error (App. 49, R-489).

It is from that last refusal that a Writ of Certiorari is sought by this petition.

REASONS FOR GRANTING THE WRIT

1. There is involved here the broad question of when there is a direct and willful violation of a Federal statute, enacted for the benefit of a particular class of persons,

which statute does not specifically provide a civil remedy for its violation, whether a State Court can so interpret and restrict the statute as to prohibit a recovery at common law for the admittedly wrongful act.

Jurisdiction should be granted under *Murray* vs. *Joe Gerrick and Company, et al.*, 291 U. S. 315, 316, 78 L. Ed. 821 which holds:

> "Where the petition for certiorari alleged that the highest court of the State misconstrued an Act of Congress providing for application of State laws relating to action to recover for wrongful death, the Supreme Court has jurisdiction."

United Construction Workers affiliated with United Mine Workers of America, et al. vs. *Laburum Construction Company*, 347 U. S. 656, 98 L. Ed. 1025, which holds:

> "Because of the importance of the jurisdictional issue to the enforcement of common law rights—we granted limited certiorari."

In that case this Court also stated:

> "Here Congress has neither provided nor suggested any substitute for the traditional State court procedure for collecting damages for injuries caused by tortious conduct. *For us to cut off the injured respondent from this right will deprive it of its property without recourse or compensation.* To do so will, in effect, grant petitioners (defendants) immunity from liability for their tortious conduct. We see no substantial reason for such a result."

The Court also cited the case of *Garner* vs. *Teamsters Union*, 346 U.S. 485, 98 L. Ed. 228, stating:

> "To the extent that Congress prescribed preventive procedure—(the Garner) case recognized that the Act excluded conflicting state procedure to that same end. To the extent, however, that

> Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, *there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated.*"

Texas and Pacific Railway Company vs. *Rigsby*, 241 U.S. 33, 60 L. Ed. 874 holds:

> "Headnote 2. An employee of an interstate railway company * * * is within the protection of the Federal Safety Appliance Acts * * *, which impliedly create a private right of action in favor of an employee injured through a violation of the commands of those statutes * * *."

The opinion stated:

> "None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee, but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employers' Liability Act, has never been doubted. (Citing a long line of decisions.) A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class *for whose especial benefit* the statute was enacted, the right to recover the damages from the party in default *is implied*, according to a doctrine of the common law expressed in 1 Comyn's Digest, titled 'Action upon Statute (F)', in these words:
>
> > " '*So, in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.*' "

Also, the holdings in *Morris* vs. *Alabama*, 294 U.S. 590, 597, 79 L. Ed. 1074 and *Fiske* vs. *Kansas*, 274 U.S. 380,

385, 386, 71 L. Ed. 1108, support the reason for granting jurisdiction. See also *Tunstalk* vs. *Brotherhood of Locomotive F and E.*, 323 U.S. 210, 89 L. Ed. 187, and *St. Louis and Iron Mountain Railway* vs. *Taylor*, 210 U.S. 283, 52 L. Ed. 1061.

Although the case of *General Teleradio* vs. *Manuti*, 284 App. Div. 400, 131 N.Y. S. 2d 365 is from a State court not the highest of that State, nevertheless the case is so directly in point, both on the merits of the case and on the jurisdictional question, and the language of Cohen, J., is so apt and pertinent, we take the liberty of quoting extensively from this case.

This decision was rendered on an appeal from an order of the Supreme Court of New York, dismissing the complaint of plaintiff, the decision being rendered in June of 1954.

Plaintiffs, who were engaged in the business of radio and television broadcasting, brought an injunction suit against a labor union of professional musicians, alleging that although the contract between the parties had expired, yet because the plaintiffs refused to hire 40 musicians to act in a stand-by capacity, the defendants were picketing their place of business in violation of the Lea Act (U.S. Code Title 47, S. 506). The Lea Act, a Federal penal statute quoted in the opinion, provides for the imposition of penal provisions to be imposed upon application by the Government, but grants no remedies to the protected class. (In this respect, the statute is identical with the Federal Housing and Rent Act under consideration in the instant case.)

The Court held:

> "The rule is well settled that where a criminal or penal statute imposes a duty but furnishes no civil remedy to the protected class, a breach of that duty gives rise to a cause of action in favor

> of the latter class. Where, as here, the *complaint alleges a breach of a Federal statute, a State court has full power to enforce the liability* which arises from the breach of such statutory duty."

The Court cites in support thereof *Claflin* v. *Houseman*, 93 U.S. 130, 136, 137, 23 L. Ed. 833; *Second Employers' Liability Cases*, 223 U.S. 1, 56, 57, 56 L. Ed. 327; *Fairport R. Co.* vs. *Meredith*, 292 U.S. 589, 594, 78 L. Ed. 1050.

Then the Court held:

> "* * * we hold that the provisions of the Lea Act with their restrictive criminal clauses, which contain no civil remedies in favor of aggrieved parties, give a right of action with power in the State courts to enforce civil remedies in favor of aggrieved parties.
>
> "Violation of the Lea Act, as alleged in the complaint, is an allegation of fact that defendants acted without justification, and hence are liable under the laws of this State for injury intentionally inflicted upon another without justification."

The Court held that in New York, where there is a penal state statute which imposes a duty upon another, any person having a special interest in the performance thereof may sue for its breach *(Willy* vs. *Mulledy* (1879), 78 N.Y. 310, 314; *Amberg* vs. *Kinley*, 214 N.Y. 531, 535, 108 N.E. 830).[9]

The Court then held:

> "The doctrine of tort law of New York State is that prima facie, the intentional infliction of

9. In West Virginia, there is a similar statute, Code Ch. 55, Art. 7, Sec. 9 which provides: "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty of forfeiture for such violation be thereby imposed, unless the same be expressly *mentioned* to be in lieu of such damages."

temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of the pleading, requires a justification if the defendant is to escape." *(Advance Music Corp.* vs. *American Tobacco Co.,* 296 N. Y. 79, 83, 70 N.E. 2d 401; *Aikens* vs. *Wisconsin,* 195 U.S. 194, 204, 49 L. Ed. 154; the quoted language here is from this case.)

The Court also quoted from the case of *Claflin* vs. *Houseman, supra,* at page 137:

"If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

The *Claflin* case further held, page 136:

"The laws of the United States are laws in the several States and just as much binding on the citizen and courts thereof as the State laws are."

And at page 137:

"The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of nature and relations of the State and Federal Governments."

In the *Second Employers Liability* case, *supra*, in which the question arose as to whether rights under the Employers Liability Act could be enforced in State courts, even though the State courts objected to hearing such cases, this Court in holding that the State courts were compelled to take jurisdiction, stated at page 56, 57:

> "Rights arising under the regulations prescribed by the Employers Liability Act may be instituted, as a right, in the courts of the States when their jurisdiction, as fixed by local laws, is adequate for the occasion."

In the *Fairport R. Co.* vs. *Meredith, supra*, the question arose as to whether a traveler on the highway was given rights under the Safety Appliance Act, where that Act was passed for the apparent purpose, and whose title indicated it was for the purpose, of protecting railway employees, and this Court in syllabus 5, and at page 598, held:

> "The Safety Appliance Act imposes absolute duties upon Interstate Railway Carriers and thereby created correlative rights in favor of such injured persons as come within its purview; but the right to enforce the liability which arises from the breach of duty is derived from the principles of the common law."

Also see *Gabriel* vs. *Boroway*, 85 N.E. 2d 435, in which the Supreme Court of Massachusetts, by way of dicta in that case, held that there was a common law right of action to the tenant for a violation of the Federal Housing and Rent Act, although deciding the case on other points.

Therefore, it is respectfully suggested that the issue in question here is broader than the instant case, in that the question once again arises before this Court as to whether the State Courts may refuse a right of action for a willful and intentional violation of a Federal statute

which provides no specific civil remedy for its breach, or whether the State Courts are duty bound to give the injured party a hearing on his claim for damages.

2. There is a complete divergence and conflict of opinion in the State and lower Federal Courts concerning whether a violation of a Federal statute, such as the Federal Rent and Housing Act, which imposes no specific civil remedy for its breach, gives rise to a common law right of action. Those cases which hold in whole or in part that the injured person has a common law right of action are:

Crawford vs. *Pituch*, 91 Fed. Supp. 626, 628;

Murphy vs. *T. B. O'Toole, Inc.*, 45 Del. 540, 76 Atl. 2d 313;

Bedell vs. *Daugherty*, 362 Missouri 598, 242 S.W. 2d 572;

Merriwether vs. *Lumbard* (Mo. App.), 246 S.W. 2d 363;

Crawford vs. *Pituch*, 368 Pa. 489, 40 Atl. 204;

Trepanies vs. *Hajbes*, 134 Conn. 24, 54 Atl. 275;

Teare vs. *Sisman* (Colo. 1949), 210 Pac. 2d 446;

Gabriel vs. *Boroway* (1949 Mass.), 85 N.E. 2d 435;

Kilroy vs. *Barren*, 326 Mass. 464, 95 N.E. 2d 910;

Ranchina vs. *Arcinas*, 78 Calif. Appeals 552, 178 Pac. 65.

Among those holding no such liability exists are:

Harrison vs. *Webb*, 45 Ohio Appeals 141, 100 N.E. 728 (which collects practically all of the authorities pro and con to the date of that decision);

Ferguson vs. *Budenberg*, 87 Ohio Appeals 326, 94 N.E. 568;

Behrendt vs. *Rossmussin*, 234 Minn. 97, 47 N.W. 2d 774;

Sherr vs. *Perelman*, 324 Mass. 390, 96 N.E. 2d 902;

Smith vs. *Bozzi*, D.C. Mun. App., 83 Atl. 2d 436;

Cato vs. *Silling* (W.Va., the instant case), 73 S.E. 2d 731.

Jurisdiction may be granted where there is a conflict of decisions between State Courts or State and Federal Courts; see Stern and Grossman, Supreme Court Practice, page 110 to 121.

3. Defendant has been deprived of his property and has had his privileges and immunities abridged by the Supreme Court of Appeals of West Virginia, and denied due process of law, and equal protection of the law.

See *Twining* vs. *New Jersey*, 211 U.S. 78, 53 L. Ed. 97 to the effect that:

> "Due process requires the Court, assuming to determine the rights of the parties, to have jurisdiction and that there shall be notice and opportunity for the parties to be heard. The method of procedure by which a State determines by what process legal rights may be asserted or legal obligations be enforced must provide that reasonable notice be given and fair opportunity to be heard before the issue is decided, else there is a violation of the Fourteenth Amendment."

Chapter 37, Article 6, Section 5, Code of West Virginia (App. 4) requires that tenancy be ended by the giving of a notice, and Chapter 37, Article 6, Section 19 (App. 4) provides that any person having the right of reentry into lands by reason of arrears of rent, or breach of

a covenant or condition, may serve a declaration in ejectment on the tenant in possession, and upon proof to the Court, or on the trial, may recover judgment and have execution for such lands.

Code, Chapter 50, Article 2, Sections 1, 2, 3, 4, 6 and 7, (App. 5) under the heading of Unlawful Entry or Detainer, provides the statutory procedure as to how a landlord may institute action against a tenant detaining possession of land after his right has expired, without consent, states how the summons should be served, details the trial and provides in case of a decision for the defendant, that he shall have judgment and execution for his costs.

The petitioner had the property right of a lease from month to month in the dwelling house leased by Mrs. Allen, and on such a month to month tenancy, the landlord is required to give one month's notice in writing in advance to such a tenant to quit and deliver up possession of the rented premises, before he can even institute such a suit for unlawful detainer for the recovery of the premises. (See Code, Chapter 37, Article 6, Section 5, App. 4.)

Under the Federal Housing and Rent Act, and the Order of the Rent Director in the instant case, after April 11, 1950, the respondent herein could have instituted such an action against the petitioner for the recovery of the premises, and if he otherwise took the premises, then under and by virtue of Chapter 55, Article 3, Section 1 (App. 7) the person ousted had a right to sue and recover damages.

The case of *Bennett* vs. *Holliday*, 66 W.Va. 385, 66 S.E. 502, holds that notice to the tenant to quit and deliver up the premises must be had upon the tenant before the landlord can institute suit to evict him. The Supreme Court of West Virginia held in *Rogers* vs. *Jones*,

129 W.Va. 264, 39 S.E. 919, that the certificate of the Rent Director does not order the tenant to move and is not the notice required by law. (The notice in this instant case also stated it was not a notice to move, and tenant was protected by State law, R-166.)

In *Simpson* vs. *Stanton*, 119 W.Va. 325, 193 S.E. 64, the Supreme Court of Appeals of West Virginia defined the right of due process, stating that notice and hearing were required and that there "can be no due process of law without a fair and reasonable opportunity for a hearing in the matter on dispute."

Therefore, petitioner was deprived of his tenancy without any notice or hearing, was deprived of his property right, that is, the right of tenancy, without notice or hearing, and without the right of redress and was deprived of his personal property and the judgment for his personal injuries, all without due process of law; and petitioner contends he was not given equal protection of the law, all by reason of the decision of the Supreme Court of Appeals of West Virginia.

In all of the cases cited, *supra*, under part 2 of this Statement, holding that there was no cause of action to the tenant, it will be noted that in each and every one of those there had been a hearing in a State court under an "Unlawful Detainer", or similar action, and it was alleged in each case that the State court had granted an ouster of the tenant and he had moved because thereof. Action was predicated on the theory that the landlord had recovered possession of the premises either upon fictitious or other improper grounds, and that the tenant suffered damage thereby. Upon such facts, these courts refused redress.

In the cases allowing a recovery to the tenant, in some instances there was a hearing under local rent laws and in others there was not. Seemingly, the instant case is

the only one wherein the tenant in possession was unlawfully ousted, yet not permitted a right of action to recover damages.

In the Minnesota case of *Behrendt* vs. *Rossmussin, supra,* there was an action of unlawful detainer brought and the defendant complied with all the legal requirements of the State law regarding such unlawful detainer actions. The Court held that in such circumstances the Federal Housing and Rent Act gave the tenant no right to recover damages for a wrongful eviction, saying that *while the plaintiff suffered a wrong,* yet there *was no legal ground upon which the Court could grant relief.*

Yet this Court in *Texas and Pacific Railway Company* vs. *Rigsby, supra,* held that in every case where a statute enacts or prohibits a thing for benefit of a person, he shall have a remedy for the wrong done to him, saying "This is but one application of the maxim *ubi jus ibi remedium*".

We respectfully submit such should be the decision in favor of a tenant, under the Federal Housing and Rent Act, or the decision in favor of a tenant, under the Federal Housing and Rent Act, or the decision in favor of any person who has been injured or damaged by the violation of any Federal statute, even though that statute provides no specific civil remedy.

The fact that the Federal Housing and Rent Act has expired since the institution of this suit should not deter this Court from granting certorari. The dropping of one "A" or "H" bomb would, we are told, or the start of World War III, cause such havoc and destruction that a new Rent Act would be immediately necessary.

But apart from that, it is essential, we submit, that this Court declare that the willful violation of any Federal statute, to the express injury and damage of any individual, should create a common law right of action for

the benefit of that individual, enforceable in a State Court, even though the Federal Act provides no specific remedy for its violation. Else why enact the Federal statute?

CONCLUSION

In conclusion, and by analogy, we cite the following: A jury had rendered a verdict for $300.00, when the damage done by a truck driver in backing over a lady's mail box was under $25.00. The driver, when the lady requested him to keep off her lawn, told her to go to hell.

When this self-same Court of Common Pleas of Kanawha County, West Virginia, was about to reduce the verdict, the jury foreman, upon receiving permission to speak, stated, "When any truck driver tells a respectable lady to go to hell, he has just done spent $300.00, so far as this jury is concerned."

We submit, when respondent completely and willfully disregarded the order and directive of the Area Rent Director, that he could not begin demolition before April 11, 1950, and tore petitioner's dwelling down around his ears beginning on March 1, 1950, this Court should tell respondent, as did the jury foreman, that he's "just done spent his money," and petitioner is entitled to such reasonable damages as may be determined by a jury of his peers.

For the foregoing reasons, this petition for a writ of certorari should be granted.

Respectfully submitted,

J. CAMPBELL PALMER III
Counsel for Petitioner

FILED
FEB 21 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 609

HENRY S. CATO,
Petitioner

vs.

CYRUS E. SILLING, SR.,
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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thereto, or any other real or personal property renting or offered for rent for living or dwelling purposes, including houses, apartments, rooming or boarding house accommodations, and other property used for living or dwelling purposes, together with all privileges, services, furnishings, furniture and facilities connected with the use or occupancy of such property.

(c) The term "Controlled Housing Accommodations" means housing accommodations in any defense rental area, except that it does not include * * * (hotels, motor courts, and certain other such places are excluded, not material to this case).

(d) The term "Defense Rental Area" means any part of any area designated, under the provisions of the Emergency Price Control Act of 1942, as amended, prior to March 1, 1947, as an area where defense activities have resulted or threatened to result in an increase in the rents for housing accommodations inconsistent with the purpose of such Act, in which maximum rents (1) were being regulated under such Act of March 1, 1947, or (2) * * *." (Sections of this Title)

II. Section 1896—Prohibition and Enforcement

(a) (2) It shall be unlawful for any person to evict, remove or exclude or cause to be evicted, removed or excluded, any tenant from any Controlled Housing Accommodations in any manner or upon any grounds except as authorized or permitted under the provisions of this Act, or any regulations order or requirement thereunder, and any person who lawfully gains possession from a tenant of any Controlled Housing Accommodations and thereafter fails fully to comply with such requirements or conditions as may have been imposed for such possession by the provisions of this Act or any regulation order or requirement thereunder, shall also be deemed to have unlawfully evicted such tenant * * *.

(b) Whenever in the judgment of the President any person has engaged or is about to engage in any acts or practices which constitute or will constitute any provisions of this Act, (Sections 1891-1910 of this Appendix), or any regulation or order issued thereunder, the United States may make application to any Federal, State or Territorial Court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order, shall be granted without bond.

(h) It shall be unlawful for any person to remove or attempt to remove from any Controlled Housing Accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such Accommodations because such tenant or occupant has taken, or proposes to take action authorized or required by this Act or any regulation order or requirement thereunder.

(1896—March 30, 1949, C. 42, Title II, S. 205, 63 Stat. 27)

III. Section 1899—Whenever in the judgment of the President such action is necessary or proper in order to effectuate the purposes of this Act (1889-1910 of this Appendix) he may, by regulation or order, regulate or prohibit speculative or manipulative practices of renting or leasing practices (including practices relating to recovery of possession) in connection with any Controlled Housing Accommodations, which in his judgment are equivalent to or are likely to result in rent increases inconsistent to the purpose of the Act.

IV. Section 1901—Application

The provisions of this Title (Section 1891-1902 of this Appendix) shall be applicable to the several States and

to the Territories and possessions of the United States but shall not be applicable to the District of Columbia.

V. Section 1910. Effective Date of Housing and Rent Act of 1949

This Act (Sections 1892-1896 and 1907-1910 of this Appendix and Section 1738(a) of Title 12) shall become effective on the 1st day of the calendar month following the month in which it is enacted.

(March 30, 1949, C. 42, Title III, S. 305, 63 Stat. 29)

Code of West Virginia, Chapter 37, Article 6, Section 5

Portions of the Code of West Virginia to which reference is made in the foregoing Petition.

"NOTICE TO TERMINATE TENANCY—A tenancy from year to year may be terminated by either party giving notice in writing to the other, at least three months prior to the end of any year, of his intention to terminate the same. A periodic tenancy, in which the period is less than one year, may be terminated by like notice, or by notice for one full period before the end of any period. When such notice is to the tenant, it may be served upon him—."

Chapter 37, Article 6, Section 19

Right of Reentry; Ejection; Unlawful Detainer; Judgment by Default. . . .

Any person who shall have the right of re-entry into the lands by reason of any rent issuing thereout being in arrear, or by reason of the breach of any covenant or condition, may serve a declaration in ejectment on the tenant in possession, where there shall be such tenant, or, if the possession be vacant, by affixing the declaration upon the chief door of any messuage, or at any other conspicuous place on the premises, which service shall be in

lieu of a demand and reentry; or may commence an action of unlawful detainer, and obtain service either in person or by publication, as in other such actions, which service shall be in lieu of a demand and reentry; and upon proof to the court, by affidavit in case of judgment by default, or upon proof on the trial that the rent claimed was due, and there was not sufficient property subject to distress upon the premises to satisfy the claim for rent due, or the covenant or condition was broken before the service of the declaration in ejectment, or the commencement of the action of unlawful detainer, and that the plaintiff had power thereupon to reenter, he shall recover judgment, and have execution for such lands. In case the time for reentering be specified in the instrument creating the rent, covenant or condition, the proceedings in ejectment or unlawful detainer shall not be begun until such time shall have elapsed.

Chapter 50, Article 2

Section 1. Action Must Be Commenced Within Three Years; Venue.—If any forcible or unlawful entry be made upon land, or if, when the entry was lawful, the tenant detain possession of land after his right has expired, without the consent of him who is entitled to the possession, the party so turned out of possession, no matter what right or title he had thereto, or the party against whom such possession is unlawfully detained, may commence suit to obtain possession of the land and damages for its detention, which shall include rent, within three years after the cause of action accrues, before any justice of the county in which such land or the greater part thereof is situated.

Section 2. Summons.—At the instance of the party so turned out of possession, or against whom possession is unlawfully detained as aforesaid, the justice shall issue a summons commanding the officer to summons the de-

fendant to appear before the said justice, at a time and place therein specified, to answer the action of the plaintiff for unlawfully withholding from the plaintiff the premises in question (describing them) and damages for their detention (if any are claimed). The place at which the defendant is to appear must be within the county, and the time must be not less than three or nor more than ten days from the delivery of the summons to the officer to be served. No such summons shall be quashed or held insufficient for any defect in the description of the premises therein mentioned, if the description be such as to enable a person of common understanding to know what is intended thereby. And if in the opinion of the justice such description is not sufficient under the provisions of this section, the plaintiff may amend the summons so as to make the description sufficient.

Section 3. Direction, Service and Return of Summons.—The summons must be directed, served, and returned as other summonses issued by justices.

Section 4. Trial; Title Not to be Inquired of.—On the return of the summons served, the Justice shall proceed to try the case, unless good cause be shown for a continuance. Either party shall be entitled to a trial by six jurors, if demanded, under the same regulations which are prescribed in relation to such trials in other cases before justices, except that the jury shall be sworn well and truly to try whether the defendant unlawfully withholds the premises in controversy from the plaintiff, and, if damages are claimed for the detention, to assess the plaintiff's damages, which shall include rent, for being so kept out of possession. On such trial the title to the real estate shall not be inquired of, but only the possession and the unlawful entry, or detainer and the damages shall be in question.

Section 6. Judgment for Plaintiff: Damages; Costs; Execution.—If the verdict of the jury, or the finding of

the justice when the case is tried without a jury, be that the defendant unlawfully withholds the premises in controversy, or any part thereof (describing the part) from the plaintiff, judgment shall be rendered in favor of the plaintiff that he recover possession of the premises, or of the part so described, and his costs. If damages are assessed by the justice or jury in favor of the plaintiff, the same shall also be included in the judgment, and the justice, when required by the plaintiff, shall issue an execution commanding the officer to whom it is directed to deliver possession of the premises, or such part thereof, to the plaintiff, and remove the defendant and his goods therefrom, and collect the said damages and costs out of the personal property of the defendant. Such execution shall be returnable within sixty days from its date, and, as to the delivery of possession and removal of the tenant and his goods, it shall be executed within five days from the time it comes into the hands of the officer.

Section 7. Judgment for Defendant.—If the verdict of the jury, or the finding of the justice, when the case is tried without a jury, be for the defendant, he shall have judgment and execution for his costs.

Code of West Virginia, Chapter 55, Article 3, Section 1

"SUMMONS—If any forcible or unlawful entry be made upon any land, building, structure, or any part thereof, or if, when the entry is lawful or peaceable, the tenant shall detain the possession of any land, building, structure, or any part thereof after his right has expired, without the consent of him who is entitled to the possession, the party so turned out of possession, no matter what right or title he had thereto, or the party against whom such possession is unlawfully detained, may, within three years after such forcible or unlawful entry, or such unlawful detainer, sue out of the clerk's office of the circuit court, or of any court of record empowered to try

common-law actions, of the county in which the land, building, structure, or some part thereof may be, a summons against the defendant to answer the complaint of the plaintiff that the defendant is in the possession of, and unlawfully withholds from the plaintiff the premises in question (describing the same with convenient certainty), to the damage of the plaintiff in such sum as the plaintiff shall state; and no other declaration shall be required."

EXCERPTS FROM CONTROLLED HOUSING RENT REGULATION

Housing Eviction Provisions, April 1, 1949

OFFICE OF HOUSING EXPEDITER

§ 825.6 *Removal of tenant*—(a) *Restrictions on removal of tenant.* So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for surrender of possession, or for entry of judgment upon the tenant's confession for breach of the covenants thereof, or which otherwise provides contrary hereto, except on one or more of the grounds specified in this paragraph (a), or unless the landlord has obtained a certificate in accordance with paragraph (c) of this section: *Provided, however,* That no provisions of this section shall be construed to authorize the removal of a tenant unless such removal is authorized under local law.

(1) *Violating substantial obligation of tenancy.* * * *

(2) *Nuisance or illegal or immoral use.* * * *

(3) *Tenant's refusal of access to landlord.* * * *

(4) *Accommodations entirely sublet.* The tenant's lease or other rental agreement has expired or otherwise terminated, and at the time of termination the occupants of the housing accommodations are subtenants or other persons who occupied under a rental agreement with the tenant, and no part of the accommodations is used by the tenant as his dwelling.

(5) *Landlord is a state or political subdivision thereof.* * * *

(6) *Company housing.* * * *

(b) *Notice required.* (1) No tenant shall be removed or evicted from housing accommodations by court process or otherwise and no action or proceeding shall be commenced for such purpose upon any of the grounds permitted in paragraph (a) of this section unless and until the landlord shall have given written notice to the Area Rent Office and to the tenant as provided in this paragraph (b) (1).

Every such notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground under this section upon which the landlord relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession. Where the ground for removal or eviction of a tenant is nonpayment of rent such notice shall include a statement of the rent due and the rental period or periods for which such rent is due. A written copy of every notice required by this paragraph (b) (1) shall be filed with the Area Rent Office within 24 hours after such notice is given to the tenant.

Every such notice shall be given to the tenant at least

the following period of time prior to the date specified therein for the surrender of possession and to the commencement of any action for removal or eviction:

* * *

(d) Where the notice specifies one or more of the grounds stated in paragraphs (a) (4), (a) (5) and (a) (6) of this section for such removal or eviction, not less than two months.

* * *

(2) At the time of commencing any action to remove or evict a tenant, on any ground stated in paragraph (a) of this section the landlord shall give written notice thereof to the Area Rent Office, stating the title of the case, the number of the case where that is possible, the court in which it is filed, the name and address of the tenant, and the ground under said paragraph on which removal or eviction is sought.

(c) *Eviction certificate; grounds for issuance.* No tenant shall be removed or evicted on grounds other than those stated in paragraph (a) of this section, unless on petition of the landlord the Housing Expediter certifies that the landlord may pursue his remedies in accordance with the requirements of local law. The certificate shall authorize the pursuit of local remedies at the expiration of the waiting period specified in paragraph (d) of this section. The Expediter shall so certify if he finds that removals or evictions of the character proposed are not inconsistent with the purposes of the act or this regulation and would not be likely to result in the circumvention or evasion thereof. The Expediter shall so find in the following cases:

* * *

(3) *Alterations or remodeling.* Where a landlord establishes that he seeks in good faith to recover possession for the immediate purpose of substantially altering or

remodeling the housing accommodations, for continued use as housing accommodations, in a manner which cannot practicably be done with the tenant in possession, *or for the immediate purpose of demolishing them,* provided that the landlord has obtained such approval for the proposed alterations or remodeling or demolition as may be required by federal, state and local law.

* * *

(5) *Withdrawal from rental market.* Where the landlord establishes that he seeks in good faith to recover possession of the housing accommodations for the immediate purpose of (a) making a permanent conversion to commercial use by substantially altering or remodeling them or (b) personally making a permanent use of them for non-housing purposes or (c) permanently withdrawing them from both the housing and nonhousing rental markets without any intent to sell the housing accommodations.

(d) *Eviction certificates; waiting period.* Certificates issued under paragraph (c) of this section *shall authorize the pursuit of local remedies at the expiration of three months from the date of the filing of the petition; Provided, however,* That:

* * *

(3) In any case where the Expediter finds that by reason of exceptional circumstances extreme hardship would result to the landlord, he may waive all or part of the waiting period.

(e) *Change of intention.* * * *

(f) *Local laws.* No provision of this section shall be construed to prohibit a landlord who has obtained a certificate under paragraph (c) of this section from serving, prior to the expiration of the waiting period specified in said certificate, such notice or notices as may be required by the local law, provided that such notice or notices do

not demand surrender of possession until after expiration of said waiting period.

(g) *Exceptions.* The provisions of this section do not apply to:

(1) *Subtenants.* A subtenant or other person who occupies or occupied under a rental agreement with the tenant, where removal or eviction of the subtenant or other such occupant is sought by the landlord of the tenant, unless the rental agreement between the landlord and tenant contemplated the subletting by the tenant of the entire accommodations or substantially all of the individual units therein, or *unless under the local law there is a tenancy relationship between the landlord and the subtenant or other such occupant.*

* * *

(Sec. 204 (d), 61 Stat. 197, as amended by 62 Stat. 37, by 62 Stat. 94 and by Pub. Law 31, 81st Cong.; 50 U. S. C. App. 1894 (d))

This amendment shall become effective April 1, 1949.

Issued this 31st day of March 1949.

TIGHE E. WOODS,
Housing Expediter.

OPINIONS OF COURTS BELOW:

(Following 1st Jury Trial)

STATE OF WEST VIRGINIA
COURT OF COMMON PLEAS
OF KANAWHA COUNTY, CHARLESTON

September 6, 1950

Staige Davis
Judge
Mr. S. D. Lopinsky
Attorney at Law
Charleston, W. Va.

Mr. J. B. Fisher
Attorney at Law
Charleston, W. Va.

Re: Henry S. Cato

v.

Cyrus E. Silling, Sr.

Gentlemen:

I have given my serious consideration to the motion to set aside the verdict of the jury in this case, and to the oral and written arguments of counsel in support thereof and opposition thereto.

I have come to the conclusion that the rule announced in the case of *Ennis* v. *Brawley*, 129 W. Va. 621 impels this Court to sustain the motion. The Supreme Court in its opinion in the *Ennis* v. *Brawley* case reviews the various cases decided by the Court over the years and reaffirms the opinion rendered in the case of *Toler* v. *Cassinelli* decided a month previous, which approves the *Hess* and *Pendleton* cases; and the opinion says:

> "** this jurisdiction is committed to the principle that although exemplary damages are recoverable

in a proper case the amount thereof, or rather the aggregate of compensatory and exemplary damages, when divided by special interrogatories as here must be comprised of two figures which bear a reasonable proportion to each other, the compensatory damages having evidence to sustain them and the exemplary damages not being in a plainly disproportionate amount thereof. In *Pendleton* v. *Norfolk & Western Railway Company*, 82 W. Va. 270, 95 S. E. 941, which involved a recovery for assault and battery as here, an award of punitive damages of ten times the amount of substantial compensatory damages was set aside as being plainly disproportionate."

Counsel will please present proper order sustaining motion to set aside the verdict of the jury and awarding a new trial. I will this week adjourn the June Term of this Court.

Very truly yours,
/s/ Staige Davis
Judge

SD:wlg

Given under my hand and the seal of said Court this 22nd day of January, 1955.

M. H. HIX, *Clerk*
Court of Common Pleas, Kanawha
County, West Virginia

Supreme Court of Appeals of West Virginia
***Cato* vs. *Silling*, 73 S.E. 2nd 731**
Decided Dec. 16, 1952

(Following 2nd Jury Trial)

SYLLABUS BY THE COURT

1. The Housing and Rent Act of 1947, Chapter 163, 61 Stat. 193, as amended by the Act of March 30, 1948,

Chapter 161, 62 Stat. 93, and the Act of March 30, 1949, Chapter 42, 63 Stat. 18, 50 U.S.C.A. Appendix, Sections 1881 to 1910, in effect in March, 1950, did not provide any civil remedy, or create any cause of action, for the recovery of damages by the tenant for his wrongful eviction by his landlord from premises occupied by such tenant.

2. A declaration in an action of trespass on the case which alleges in substance that the plaintiff, while in lawful possession of premises as a subtenant of the lessee of the defendant, was maliciously, willfully, wrongfully, and wantonly evicted from the premises by the defendant, and that as the result of such act of the defendant the plaintiff was injured and damaged in his person and property, states a good cause of action under the law of this State.

3. An instruction which correctly states principles of law but which contains a statement which is not based on the evidence is erroneous.

4. An erroneous instruction is presumed to be prejudicial and warrants a new trial unless it appears that the complaining party was not injured by the giving of such instruction.

5. When it appears, from the facts in evidence, that a jury could not legally award exemplary damages, and it also appears that a verdict included such damages, it is the duty of the trial court, upon proper motion, to set aside the verdict and grant a new trial.

6. Ordinarily the proper measure of damages for the loss or the destruction of personal property, other than that which has a peculiar value to its owner, is the fair market value of the property at the time of its loss or destruction.

7. As a general rule the proper measure of damages

for injury to personal property is the difference between the fair market value of the property immediately before the injury and the fair market value immediately after the injury, plus necessary reasonable expenses incurred by the owner in connection with the injury. When, however, injured personal property can be restored by repairs to the condition which existed before the injury and the cost of such repairs is less than the diminution of the market value due to the injury, the measure of damages may be the amount required to restore such property to its previous condition.

8. "A verdict clearly in excess of the amount which the evidence shows the plaintiff is justly entitled to recover should be set aside by the trial court." Point 2, Syllabus, Thomason v. Mosrie, 134 W.Va. 634 [60 S.E.2d 699].

9. A statement of an attorney, made in the absence of his client and without his knowledge or consent, which constitutes a mere expression of opinion that his client would not do a particular act, is inadmissible in evidence against his client.

Litton, Fisher & Schaffer, J. B. Fisher, and Donald L. Schaffer, Charleston, for plaintiff in error.

Salisbury, Hackney & Lopinsky and Jackson D. Altizer, Charleston, for defendant in error.

HAYMOND, Judge.

In this action of trespass on the case, instituted in the Court of Common Pleas of Kanawha County on March 27, 1950, the plaintiff, Henry S. Cato, a practicing attorney of Charleston, and a former judge of the Circuit Court of Kanawha County, seeks to recover from the defendant, Cyrus E. Silling, Sr., damages for the alleged wrongful eviction of the plaintiff from a room occupied

by him as subtenant from month to month in a large dwelling located at the corner of Kanawha Boulevard and Morris Street, designated as 1216 Kanawha Boulevard, East, in Charleston, Kanawha County, West Virginia, which dwelling had been previously leased by the defendant to Clara Williams Allen as a tenant from month to month. The theory on which plaintiff bases his claim for damages is that the defendant, during the period March 1 to March 13, 1950, evicted the plaintiff from the premises occupied by him in violation of an Act of Congress known as the Housing and Rent Act of 1947, its amendments then in effect, certain rules and regulations promulgated under that statute, and the law of this State relating to landlord and tenant.

The defendant interposed no demurrer to the declaration, which consists of a single count, but filed his plea of not guilty. Upon a trial of the issues raised by the declaration and the plea, the jury returned a verdict in favor of the plaintiff for $3,300. In response to requested interrogatories the jury awarded $2,000 as compensatory damages and $1,300 as punitive damages. At the conclusion of the evidence offered by the plaintiff and at the conclusion of the evidence introduced by both parties the court of common pleas overruled separate motions of the defendant to strike the evidence and direct a verdict for the defendant. That court also overruled a motion of the defendant to set aside the verdict and to grant him a new trial and by final order entered January 10, 1951, entered judgment in favor of the plaintiff for the amount of the verdict with interest and costs. By order entered May 19, 1951, the Circuit Court of Kanawha County denied the petition of the defendant for a writ of error, and to that judgment this Court granted this writ of error upon the petition of the defendant.

The declaration alleges, in substance, that the defendant, as the owner of the dwelling located at the corner

of Kanawha Boulevard and Morris Street, known as 1216 Kanawha Boulevard in the City of Charleston prior to the commission of the acts complained of by the plaintiff, had leased the premises to Clara Williams Allen as a tenant from month to month; that the tenant of the defendant had sublet a room of the dwelling since April 24, 1944, to the plaintiff who had continuously occupied it as a tenant from month to month; that the United States Government had in force and effect certain statutory regulations governing the eviction of tenants and the amount of rent to be charged for dwelling units; that the dwelling occupied by the plaintiff was subject to such regulations; that such regulations prevented the eviction of tenants or subtenants except by order of the Area Rent Director; that the defendant, desiring to demolish the building occupied by the plaintiff, on January 9, 1950, by his attorney, filed a petition seeking permission to shorten the period within which the defendant could sue to evict his tenant, Clara Williams Allen, and her subtenants, and sought permission to demolish the building immediately; that by reason of the regulations the occupants of the building could not be sued for possession of or evicted from the premises until after ninety days from the date of due service of proper notice to them to vacate and surrender possession of the premises; that a copy of the petition was duly served upon the plaintiff; that the plaintiff filed an answer to the petition and resisted the granting of the prayer of the petition; that on January 19, 1950, the Area Rent Director ordered the defendant not to commence an action to remove or evict the plaintiff before April 11, 1950; that Clara Williams Allen, the tenant of the defendant, by the same attorney, on January 11, 1950, filed a petition with the Area Rent Director for permission to remove her furniture and fixtures from the premises occupied by the plaintiff and to disconnect all utilities on March 1, 1950; that the plaintiff owned all the furniture in the room occupied by him,

except a bed and a mattress which were owned by Clara Williams Allen, and kept in his room all his clothes and other personal effects; that he filed an answer to the petition of Clara Williams Allen and resisted the granting of the prayer of her petition but that the Area Rent Director, notwithstanding his prior order of January 19, 1950, by an order of January 31, 1950, permitted her to remove her furniture and to discontinue the services of utilities on or after March 1, 1950, and reduced the rent to be paid by the plaintiff from thirty dollars per month to twenty dollars and fifty cents per month in the event she removed her furniture and discontinued the utilities; that she did not remove her furniture or discontinue the utilities; that on the night of February 28, 1950, he was stricken with a severe cold, and because of his age of seventy two years and the severity of his illness, he remained in bed during that night and the forenoon and the early afternoon of March 1, 1950, in an effort to cure his cold, the weather then being very cold and inclement; that notwithstanding the severe illness of the plaintiff and the extreme cold weather, the defendant, maliciously, wilfully and wantonly intending to injure the plaintiff, in the afternoon of March 1, 1950, disconnected, or caused to be disconnected, the electricity in the dwelling occupied by the plaintiff, and in the forenoon of March 2, 1950, that being the coldest day of the winter, the temperature being seven degrees above zero, while the plaintiff was in bed in his endeavor to cure his cold, the defendant, maliciously, wilfully and wantonly contriving to injure the plaintiff, caused the water and the gas supplied to the room occupied by the plaintiff to be disconnected, in violation of the legal and constitutional rights of the plaintiff and to his great injury and damage; that the defendant, knowingly, wilfully, wrongfully, wantonly and maliciously, constructively evicted the plaintiff, on March 2, 1950, and between March 2, 1950, and March 13, 1950, on a date unknown to the plaintiff,

actually evicted him, from the premises occupied by him in direct violation of the order of the Area Rent Director of January 19, 1950; that as the proximate result of the wilful and wanton misconduct of the defendant the health of the plaintiff was greatly impaired, the plaintiff was humiliated and caused to suffer great mental anguish, distress and inconvenience, and many valuable items of clothing and personal property of the plaintiff were stolen and removed from the premises lawfully possessed and occupied by the plaintiff to his financial loss and damage; and that the defendant, in wilful disregard and violation of the federal statutes and regulations and of the statutes and the common law of this State, wilfully, wantonly, unlawfully, maliciously and negligently deprived the plaintiff of his right to occupy, and evicted him from, the premises at 1216 Kanawha Boulevard, to the damage of the plaintiff in the amount of twenty five thousand dollars.

There is little, if any, conflict in the material facts disclosed by the evidence and the only facts as to which the evidence is conflicting are relatively unimportant.

The plaintiff, as a subtenant, had occupied a room in the dwelling at 1216 Kanawha Boulevard since the year 1944 at a rental of $30 per month, payable on the first day of each month. At first he rented the room from Wallace B. Allen but afterwards he occupied it from month to month as a subtenant of Allen's wife, Clara Williams Allen. Mrs. Allen had a lease on the entire property for a fixed term when the defendant and an associate purchased it from a former owner late in the year 1944, and after the lease expired Mrs. Allen continued to occupy the property as a tenant from month to month and rented rooms to several other subtenants. In 1948 or 1949 the defendant purchased the interest of his associate and became the sole owner of the property. The defendant acquired his interest in the property for

the purpose of constructing a large apartment building on the lot occupied by the dwelling, the construction of which necessarily required the prior demolition of the dwelling.

When some of the events occurred which led to this litigation, the plaintiff was the subtenant of Mrs. Allen, she was the tenant of the defendant, and he was the sole owner of the property. No lease or other contract relating to the property existed between the plaintiff and the defendant. The plaintiff had no dealings with the defendant in connection with his payments of rent which he made to Mrs. Allen and she furnished the utilities which were obtained in her name and were included in the rent paid by the plaintiff.

For various reasons the defendant had been unable to begin the execution of his plan to construct an apartment on the site of the dwelling until the latter part of 1949 or the early part of 1950. About two weeks prior to January 9, 1950, the defendant conferred with the Federal Area Rent Director in Charleston and requested him to waive or shorten the three month period which the defendant was required, by federal regulations, to wait before obtaining possession of the property occupied by Mrs. Allen as tenant and by the plaintiff as her subtenant. On January 9, 1950, the defendant, who then owned the property, by his attorney, filed a petition with the Area Rent Director requesting permission to demolish the dwelling immediately and waiver of the three months period before he could obtain possession for that purpose. The plaintiff, having been notified of the filing of the petition, resisted the petition for several stated reasons. The Area Rent Director, by order of January 19, 1950, refused to permit the commencement of any action by the defendant to remove or evict the plaintiff, who was designated as tenant, before April 11, 1950, and the plaintiff was so notified. On January 11, 1950, the lessee of

the defendant, Mrs. Allen, by the same attorney, filed her petition with the Area Rent Director for permission to remove from the premises all her furniture and fixtures used by her subtenants and to disconnect, as of March 1, 1950, all utilities furnished them. The plaintiff was notified of the filing of the petition and opposed the granting of the permission requested by Mrs. Allen. By order of January 31, 1950, of which the plaintiff promptly received notice, the director permitted Mrs. Allen to remove her furniture and discontinue the utilities on or after March 1, 1950, and, in the event of such removal and such discontinuance, reduced the maximum rent to be paid by the plaintiff from thirty dollars per month to twenty dollars and fifty cents per month. No appeal from this order was taken or sought by the plaintiff who considered it inconsistent with the order of January 19, 1950, and for that reason of no effect.

On January 17, 1950, Mrs. Allen was served with a written notice from the defendant of the termination of her tenancy from month to month which required her to deliver possession of the premises to the defendant on February 19, 1950, the end of the next succeeding month of her tenancy, for the stated reason that the defendant desired to demolish the improvements on the land and to construct a new housing development. Mrs. Allen complied with this notice and removed all her furniture, except that in the room occupied by the plaintiff, and she and all her subtenants, other than the plaintiff, vacated the premises before the end of February, 1950. She moved into the second story of a small garage building on the rear of the lot and occupied it as a tenant from month to month without being required to pay rent to its then owner, One Morris, Inc., a corporation, for several months, after which she was required to pay a rental of twenty five dollars per month for a few additional months. This building was not demolished and was used

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in connection with the erection of the new building which was in process of construction at the time of the trial of this action in December, 1950.

On January 20, 1950, the plaintiff was served with a written notice from Mrs. Allen of her intention to terminate his tenancy from month to month which required him to deliver possession to her of the premises occupied by him on the 28th day of February, the end of the next succeeding month of his tenancy, for the stated reason that her lessor intended to demolish the improvements on the land and to construct a new housing unit. The plaintiff, relying upon the order of the Area Rent Director of January 19, 1950, disregarded the notice and continued to occupy the premises after February 28, 1950.

In December, 1949, the defendant and several other persons formed a corporation known as One Morris, Inc., in which the defendant is a shareholder and owns or is entitled to approximately one fourth of its stock; and early in February, 1950, [February 21st date of deed] the exact date not being shown, the defendant conveyed the land on which the dwelling and the garage were located to that corporation which since then has been its owner. Though a shareholder, the defendant has not been and is not an officer, a director, or an agent of the corporation, but he has been and is employed as its architect, and he prepared the plans and the specifications for the demolition of the dwelling and the construction of a new apartment building. After the property was conveyed by the defendant to One Morris, Inc., that company entered into a contract with C. H. Jimison and Sons, whose president is one of the three directors of One Morris, Inc., for the demolition of the dwelling and the construction of a new building. The Jimison Company contracted with or employed a man named Fike to demolish the dwelling and he and his employees actually performed that work. It can not be definitely determined

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from the evidence whether the relation between One Morris, Inc., and C. H. Jimison and Sons and Fike and his employees was that of employer and independent contractor or that of master and servant. Under the evidence, however, it is not necessary to determine that question in passing upon the question whether the defendant wrongfully evicted the plaintiff and damaged his property.

In the early afternoon of March 1, 1950, while the plaintiff was in bed and ill with a severe cold, a mechanic, accompanied by Mrs. Allen, entered the room occupied by the plaintiff and informed him that he had disconnected the electricity from the room. As soon as the plaintiff had dressed he left the house, walked to the Elks Club, and there by telephone talked to the attorney for the defendant and asked him to request the defendant to restore the electricity to the room. The attorney replied that he would ask the defendant but that he was sure the defendant would not do so. The plaintiff then went to the office of the Area Rent Director and complained to him about the inconsistency of his two orders of January 19, 1950, and January 31, 1950, and the director talked from his office by telephone with the attorney for the defendant. The plaintiff also went to the Press Club and there cashed a check for thirty dollars and later called at the garage and tendered that amount of money to Mrs. Allen in payment of his rent for the month of March but she refused to accept the money. The plaintiff obtained two candles from her which he used to light his room and about midnight returned to his room and spent the night there.

About ten thirty o'clock the following morning while the plaintiff was still in bed, a plumber came to his room accompanied by Mrs. Allen and told the plaintiff that he had disconnected the water and the gas from his room. The plaintiff went to the office of the Area Rent Director

in an unsuccessful effort to see him and then to the office of a Charleston lawyer where he and the lawyer worked for some time in the preparation of a bill for an injunction against the defendant which the plaintiff presented on the following day in a Federal District Court but on which that court refused to issue an injunction. The plaintiff, considering his room untenantable without utilities, the weather on March 1 and 2, 1950, having been extremely cold, obtained a room at a hotel where he spent the night of March 2, 1950, and remained for several days. He did not return to the dwelling until Sunday, March 12, 1950, when he found the outer door locked and the house in a state of partial demolition, and he was unable to enter his room. He visited the dwelling again on March 13, 1950, about five o'clock in the afternoon, accompanied by a young man from the office of his attorney, and at that time several men were engaged in the work of demolishing the house. The doors, the windows, and the radiators had been removed and articles of furniture and wearing apparel and other personal effects which the plaintiff had left in his room on March 2, 1950, were either missing or had been damaged and placed in the garage at the rear of the dwelling. Among the missing articles which were never recovered by the plaintiff were five suits of clothes, an overcoat, a pair of trousers, a radio and other personal effects owned by him.

When the plaintiff left his room on March 2, 1950, he knew that the defendant planned to demolish the dwelling. At that time the plaintiff intended to return within forty eight hours or as soon as he could have the utility services restored. Though he was suffering from a severe cold on March 1 and 2 when he visited the places at which he called he walked from each place to the other. He was treated for his cold twice by one doctor and on three separate days by another doctor who charged fifteen dollars for his services and, though the plaintiff

stated that he continued to be ill for about thirty days and one of the doctors testified that during that period the plaintiff experienced a loss of ten pounds from his normal weight, he appears [December 16, 1952] to have entirely recovered from his illness.

The plaintiff testified that he paid $17.23 in excess of the amount of the rent for his room in the dwelling as the result of his eviction; that the value to him of the five missing suits was $112.20 each for three of them and $60 each for the other two; that the cost to him of the radio was $28.97; that the total cost or the value to him of the other missing or damaged articles was $167.55; that the estimated cost of repairing the damage to his wardrobe was from $15 to $25; and that he paid $75 to investigators for their services in unsuccessfully undertaking to find the missing or stolen articles. The tailor who made the five suits for the plaintiff, however, testifying as a witness in his behalf, stated on cross-examination that the suits had no commercial value. The plaintiff also testified that he was actually evicted from his premises on March 2, 1950, and that when he found on March 14, 1950, that his personal property had been removed from his room his eviction from the premises became complete. He further testified that he was embarrassed by his eviction from his room and that he was "upset" from the time he saw his property in the garage in a damaged condition and discovered that some articles owned by him had been stolen.

There is no direct or positive evidence that the defendant evicted the plaintiff from the premises or participated in any acts or conduct which caused the plaintiff to leave the premises on March 2, 1950. The defendant was not personally present when the electricity was disconnected on March 1, 1950, or when the water and the gas were discontinued on March 2, 1950, or at any time when the plaintiff saw the workmen engaged in demolishing the

dwelling. The evidence also fails to show that the defendant controlled or influenced the action of the owner of the property, One Morris, Inc., in obtaining possession of the property or in causing the demolition of the dwelling. The only acts or conduct of the defendant which in any way connect him with the eviction of the plaintiff from the dwelling were his well known desire while he was the owner of the property to obtain possession and to hasten the demolition of the dwelling and the construction of a new building; his action in filing his petition with the Area Rent Director which resulted in the order of January 19, 1950, permitting him to institute an action to evict or remove the plaintiff from the premises on or after April 11, 1952; his activity as the architect who prepared the plans and specifications for the demolition of the dwelling and the construction of a new building and his employment in that capacity by One Morris, Inc., after its incorporation in December, 1949; and his reference to the property as "my property" in a letter which he wrote to the plaintiff on March 15, 1950, in which he stated that after Mrs. Allen and her subtenants had removed from the property he visited the house with the contractor and saw some shirts, magazines and books in a chest in one of the second floor rooms which the men working for the contractor placed in the garage and in which he offered to deliver these articles to the plaintiff if they were owned by him. Though the plaintiff testified that he knew who caused the utilities to be disconnected he did not state who that person was. Mrs. Allen, who presumably could have testified to any participation of the defendant in the discontinuance of those services, was not called as a witness by either party and did not testify in the case. Though a witness called by the plaintiff stated that the defendant "negotiated" the contract between One Morris, Inc., and C. H. Jimison and Sons for the demolition of the dwelling and the construction of a new building, he admitted on cross-

examination that he was not present when any negotiations between them occurred.

By his numerous assignments of error, as now summarized, the defendant seeks reversal of the judgment of the circuit court and the judgment of the court of common pleas on substantially these grounds: (1) The declaration does not state and the evidence does not prove a cause of action under the Housing and Rent Act of 1947 and its amendments in effect in March, 1950, or under the law of this State relating to landlord and tenant; (2) the plaintiff was guilty of contributory negligence barring recovery; (3) the defendant was not the owner, or an officer, director, or agent of the owner, of the property at the time of the alleged injury to the plaintiff, and the evidence introduced by the plaintiff is insufficient to show that the defendant actually damaged the plaintiff; (4) the evidence relating to the question of punitive damages was improperly admitted, and the single instruction offered by the plaintiff should have been refused; (5) instructions Nos. 4, 6, 8, 10, 11, and 18, offered by the defendant and refused by the court, should have been given, and (6) the admission, over the objection of the defendant, of improper evidence offered by the plaintiff.

The defendant insists that the declaration fails to state a cause of action under the federal statute known as the Housing and Rent Act of 1947, and its amendments in effect in March, 1950, and the rules and the regulations promulgated under that statute, or under the law of this State relating to landlord and tenant. The pleadings in a suit or action at law must be sufficient to support the judgment, and a judgment rendered upon a pleading which fails to state a cause of action is erroneous. 49 C.J.S., Judgments, § 40b. "Decrees in equity and judgments at law must have a basis in the pleadings and the evidence." 41 Am.Jur., Pleading, Section 381. In

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Waldron v. Harvey, 54 W.Va. 608, 46 S.E. 603, 605, 102 Am.St.Rep. 959, this Court said: "A decree, or any matter of a decree, which has no matter in the pleadings to rest upon, is void, because pleadings are the very foundation of judgments and decrees." In Vance Shoe Company v. Haught, 41 V.Va. 275, 23 S.E. 553, this Court held in Point 1 of the syllabus: "There can be no decree without allegations in the pleading to support it." See also Kesterson v. Brown, 94 W.Va. 447, 119 S.E. 677; Simmons v. Yoho, 92 W.Va. 703, 115 S.E. 851; Simmons v. Simmons, 85 W.Va. 25, 100 S.E. 743; Black v. Crouch, 85 W.Va. 22, 100 S.E. 749; Conrad v. Crouch, 68 W.Va. 378, 69 S.E. 888; 11 Michie's Jurisprudence, Judgments and Decrees, Section 23. Ordinarily a pleading which does not state facts sufficient to constitute a cause of action may be challenged at any time and at any stage of the proceedings. 71 C.J.S., Pleading, § 551. This rule applies to a declaration which completely fails to state a substantial cause of action and which can not be made good by amendment. In re Mueller's Estate, 280 Mich. 203, 273 N.W. 448; Bauman v. Bean, 57 Mich. 1, 23 N.W. 451. See also 4 C.J.S., Appeal and Error, § 274(2). There is a distinction between the defective statement of a good cause of action and the statement of a defective cause of action. 41 Am.Jur., Pleading, Section 407; 49 C.J., Pleading, § 490(2); 71 C.J.S., Pleading, § 232b. A defect in a declaration which amounts to a failure to state a cause of action is not waived by the absence of a demurrer, or by pleading over after a demurrer is filed and overruled, unless such defect is added or cured by such pleading or subsequent proceedings, 41 Am.Jur., Pleading, Section 398. The failure to state a cause of action is not cured by verdict, 41 Am.Jur., Pleading, Section 407; or by Code, 56-4-37, dealing with defects which may be disregarded on demurrer, Kidd v. Beckley, 64 W.Va. 80, 60 S.E. 1089; and such defect may be raised by motion for a new trial. 41 Am.Jur., Pleading, § 389. In 6 Michie's Jurisprudence,

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Demurrers, Section 29, the text, quoting from Burk's Pleading and Practice, 3rd Ed., Section 198, uses this language: "All defects apparent on the face of the pleadings are waived by a failure to demur except such substantial defects as are not cured by pleading over, by verdict, or by the statute of jeofails, or which show a complete absence of a cause of action, or a want of jurisdiction over the subject matter." In view of these well established principles, it is necessary in considering the question of the sufficiency of the verdict and the validity of the judgment in this case to determine whether the declaration states a cause of action under the federal statute, as amended, in effect in March, 1950, and the rules and the regulations promulgated under that statute, or under the law of this State relating to landlord and tenant.

The Housing and Rent Act of 1947, Act of June 30, 1947, Chapter 163, 61 Stat. 193, as amended by the Housing and Rent Act of 1948, Act of March 30, 1948, Chapter 161, 62 Stat. 93 and by the Housing and Rent Act of 1949, Act of March 30, 1949, Chapter 42, 63 Stat. 18, 50 U.S.C.A., Appendix, Sections 1881 to 1910, and the rules and the regulations promulgated under that statute, as so amended, in effect at the time of the commission of the alleged acts of the defendant of which the plaintiff complains in his declaration, imposed certain criminal penalties for the violation of the provisions of Section 4 of the Housing and Rent Act of 1947, as so amended, which involved acts of a different character from those charged to the defendant, but neither the statute, as so amended, nor the rules and the regulations promulgated by the Housing Expediter, under which the local Area Rent Director issued his order of January 19, 1950, withholding permission from the defendant to institute an action to evict or remove the plaintiff from the premises occupied by him until April 11, 1950, prescribed any

criminal liability for violation of any provision of the statute, any rule or regulation, or any order governing the eviction of a tenant by a landlord.

The statute, as amended, and in effect in March, 1950, provided in Section 205 for the recovery, by tenants from any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed by the act, of reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of $50, or three times the amount by which the payment demanded, accepted, or received exceeds the maximum rent which could lawfully be demanded, whichever in either case may be the greater amount, and authorized suit to recover such amount in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of any such violation. This provision, however, has no application to the facts of this case as they present no question of any overcharge of rent to the plaintiff by the defendant.

The statute, as so amended, and in effect in March, 1950, provided in Section 209(a) that no action or proceeding to recover possession of any controlled housing accommodation with respect to which maximum rent is in effect shall be maintainable by any landlord against any tenant in any court even though the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled unless "(4) the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of substantially altering, remodeling, or demolishing them and replacing them with new construction, and the altering or remodeling is reasonably necessary to protect and conserve the housing accommodations and cannot practically be done with the tenant in occupancy, and the landlord has obtained such approval as may be required by Federal, State, or local law for

the alterations, remodeling, or any construction planned; * * *".

Section 206(a) of the statute, as amended by Section 205 of the Act of March 30, 1949, provided that it shall be unlawful for any person to do any act in violation of the act or of any regulation, order or requirement under the Act. Section 209 of the Housing and Rent Act of 1947, as amended, was further amended by Section 206 of the Act of March 30, 1949, to provide that whenever in the judgment of the Housing Expediter such action is necessary or proper in order to effectuate the purposes of the Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or renting or leasing practices including practices relating to the recovery of the possession in connection with any controlled housing accommodations which in his judgment are equivalent to or are likely to result in rent increases inconsistent with the purposes of the act.

The foregoing three sections of the Housing and Rent Act of 1947, as amended, and in effect in March, 1950, and the rules and the regulations dealing with or promulgated under those sections, authorized the Area Rent Director to issue a certificate relating to eviction for accommodations subject to rent control only if he finds that if removal or eviction of the character proposed are not inconsistent with the purposes of the Housing and Rent Act of 1949, or the rent regulations, and would not be likely to result in their circumvention or evasion, and provided that if any certificate relating to eviction is issued the landlord must wait for three months from the date of the filing of his petition before he is authorized to evict his tenant in accordance with local law unless the Area Rent Director finds that by reason of exceptional circumstances extreme hardship would result to the landlord, in which event all or any part of the waiting period of three months may be waived.

It is evident that the order of the Area Rent Director of January 19, 1950, which postponed the institution or the prosecution of any action to evict or remove the plaintiff until April 11, 1950, was issued pursuant to the rules and the regulations promulgated under the Housing and Rent Act of 1947, as then amended and in effect. As the defendant, however, did not undertake to institute any action to evict or remove the plaintiff from the premises, the order of the Area Rent Director which postponed the institution or the prosecution of any such action until April 11, 1950, did not affect the defendant except to the extent that, by implication, it prevented him, by the employment of other means or methods, from obtaining such possession prior to April 11, 1950.

Section 206 of the Housing and Rent Act of 1947, as amended, and in effect in March, 1950, provided in subsection (b) that "Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." The right to obtain an injunction under the provision just quoted is conferred upon the United States, not upon a tenant, and it is evident that the refusal of the Federal District Court at the instance of the plaintiff to enjoin the defendant from acquiring possession of the premises occupied by the plaintiff was based upon the absence of any right in him, as tenant, to invoke those provisions of that section of the federal statute.

Through the Housing and Rent Act of 1947, as amended, and as further amended by the Act of July 31, 1951, Chapter 275, Title II, Section 204, 65 Stat. 147, 50 U.S.C.A. Appendix, Section 1895, provides a civil remedy to a tenant for his unlawful eviction and authorizes the recovery of reasonable attorney's fees and costs plus certain damages within designated limits, prior to that amendment which, of course, was not in effect in March, 1950, the statute, as amended by the Acts of March 30, 1948, and March 30, 1949, did not provide any civil remedy, or create any cause of action, for the recovery of damages by a tenant who was wrongfully evicted by his landlord. Crawford v. Pituch, 386 Pa. 489, 84 A.2d 204; Behrendt v. Rassmussen, 234 Minn. 97, 47 N.W.2d 779; Sher v. Perlman, 324 Mass. 390, 86 N.E.2d 902; Gabriel v. Borowy, 324 Mass. 231, 85 N.E.2d 435; Smith v. Bozzi, D.C.Mun.App., 83 A.2d 436. It follows that the allegations of the declaration which base the claim of the plaintiff to recover damages for the alleged wrongful eviction of the plaintiff upon a violation by the defendant of the order of the Area Rent Director of January 19, 1950, do not set forth a cause of action against the defendant.

Many of the averments of the declaration indicate that the plaintiff bases his claim to recover damages principally upon the alleged violation of the order of the Area Rent Director of January 19, 1950, by the defendant in evicting the plaintiff from the premises. The declaration, however, also asserts a claim of the plaintiff, under the law of this State relating to landlord and tenant, to recover damages for his alleged wrongful eviction by the defendant. The declaration alleges that at the time of his eviction the plaintiff possessed and occupied the premises as a tenant from month to month of Clara Williams Allen, the lessee of the defendant, and that the defendant wrongfully, wilfully, wantonly and maliciously, on

March 2, 1950, constructively evicted him from the premises, and between March 2, 1950, and March 13, 1950, actually so evicted him, and that in so doing damaged the plaintiff in the manner set forth in the declaration. By reason of these allegations, the declaration sufficiently sets forth a cause of action in favor of the plaintiff against the defendant under the law of this State relating to landlord and tenant, which, if supported by proof, would entitle the plaintiff to a recovery in this case. See Toler v. Cassinelli, 129 W.Va. 591, 41 S.E.2d 672. A tenant in lawful possession of premises, who is wrongfully evicted by his landlord before the expiration of his term, may maintain an action for the resulting damages. 52 C.J.S., Landlord and Tenant, § 460; 32 Am.Jur., Landlord and Tenant, Section 265. Where the wrongful eviction is malicious and wanton punitive damages may be recovered. 32 Am.Jur., Landlord and Tenant, Section 265.

The declaration sets out a cause of action for damages against the defendant. The proof, however, does not support or establish the material allegations of the declaration.

It is clear that Mrs. Allen was a tenant from month to month as the lessee of the defendant and that the plaintiff was a tenant from month to month of the lessee of the defendant and not a tenant but a subtenant of the defendant. A tenancy from month to month may be terminated by a month's notice to the tenant under Code 37-6-5, which in part provides that a periodic tenancy, in which the period is less than one year, may be terminated by notice for one full period before the end of any such period. See Elkins National Bank v. Nefflen, 118 W. Va. 29, 188 S. E. 750, 108 A.L.R. 1460. There is no privity of estate or contract between a lessor and a subtenant unless the subtenant attorns to the original lessor. 51 C.J.S., Landlord and Tenant, § 48(2); 32 Am.

Jur., Landlord and Tenant, Sections 422 and 423; 11 Michie's Jurisprudence, Landlord and Tenant, Section 57; Hawley Corporation v. West Virginia Broadcasting Corporation, 120 W.Va. 184, 197 S.E. 628, 118 A.L.R. 120; Moskin Stores v. Nichols, 163 Va. 702, 177 S.E. 109. A subtenant has no greater right against a landlord than a tenant has against him, 11 Michie's Jurisprudence, Landlord and Tenant, Section 59; 32 Am.Jur., Landlord and Tenant, Section 422; Bachinsky v. Federal Coal and Coke Company, 78 W.Va. 721, 90 S.E. 227; and the termination of the primary lease terminates the sublease. 51 C.J.S., Landlord and Tenant, § 48(1); 32 Am.Jur., Landlord and Tenant, Section 424; 11 Michie's Jurisprudence, Landlord and Tenant, Section 50; Hawley Corporation v. West Virginia Broadcasting Corporation, 120 W.Va. 184, 197 S.E. 628, 118 A.L.R. 120. That the defendant gave at least one month's notice to his tenant, Mrs. Allen, to deliver to him at midnight of February 19, 1950, possession of the premises leased to her and that she gave her tenant, the plaintiff, at least one month's notice to deliver to her at midnight of February 28, 1950, possession of the premises occupied by him, is not disputed and is clearly established. On February 19, 1950, the tenancy between the defendant and his tenant, Mrs. Allen, ended and shortly before or shortly after the date she removed her property and vacated the premises. All her tenants except the plaintiff also left the premises. On February 19, 1950, when the tenancy between the defendant and Mrs. Allen ended, and in any event on February 28, 1950, the tenancy between Mrs. Allen and the plaintiff also ended; but the plaintiff, evidently believing that the order of the Area Rent Director of January 19, 1950, permitted him to remain, refused to vacate the premises and intentionally continued to occupy them until March 2, 1950. The tenancy of the plaintiff, having been terminated on February 19, 1950, by the termination of the tenancy between the defendant and Mrs. Allen, or on

February 28, 1950, by virtue of her notice to the plaintiff, the successor in title of the defendant, One Morris, Inc., and Mrs. Allen, as against the plaintiff, had the right to reenter and take possession of the premises on March 1, 1950, without legal process if either of them did so peaceably and without unnecessary force, or violence, or breach of the peace. Angel v. Black Bank Consolidated Coal Company, 96 W.Va. 47, 122 S.E. 274, 35 A.L.R. 568; Bachinsky v. Federal Coal and Coke Company, 78 W.Va. 721, 90 S.E. 227; Shorter v. Shelton, 183 Va. 819, 33 S.E. 643. The only available remedy to prevent re-entry of the owner, in the face of the order of the Area Rent Director of January 19, 1950, was the right of the United States under the Housing and Rent Act of 1947, as amended and then in effect, to proceed to prevent violation of that order or to enforce compliance with it, by injunction, as provided in subsection (b) of Section 206 of that statute. That remedy, however, was not available to the plaintiff and was not invoked or pursued by the United States.

The contention of the plaintiff that he was constructively evicted from the premises by the defendant on March 2, 1950, when, during extremely cold weather, the mechanic accompanied by Mrs. Allen discontinued the utility service of gas and water from the room occupied by him, is wholly devoid of merit. According to the testimony of the plaintiff he went from his room on March 2, 1950, after the water and the gas were disconnected, for the purposes of having the service of those utilities restored by the defendant with the intention of returning when that had been done and within forty eight hours. When he departed he took only a few articles and left most of his possessions in his room, where he permitted them to remain, during his absence, until they were removed by the workmen who, between March 3 and March 13, 1950, were engaged in demolish-

ing the house. It is clear that the plaintiff on March 2, 1950, had no intention of permanently leaving or abandoning the premises, and he did not abandon them at that time. No constructive eviction of a tenant by his landlord occurs unless the tenant abandons the premises, within a reasonable time, by reason of the acts which he contends constitute an eviction. Abandonment of the premises by the tenant within a reasonable time, because of the acts of the landlord or someone acting for him, is essential to an eviction, and ordinarily the abandonment must be complete. 52 C.J.S., Landlord and Tenant, § 457; 32 Am.Jur. Landlord and Tenant, Sections 246 and 250; Westland Housing Corporation v. Scott, 312 Mass. 375, 44 N.E.2d 959; Magnolia Petroleum Company v. Garner, 181 Okl. 517, 75 P.2d 202. There is no abandonment, and consequently no eviction, if, when the tenant departs from the premises, he leaves his goods and effects on the premises. 52 C.J.S., Landlord and Tenant, § 458. It is also clear that the discontinuance of the service of the utilities, which the plaintiff contends constituted a wanton and wilful constructive eviction, was authorized by the order of the Area Rent Director of January 31, 1950, which expressly permitted Mrs. Allen to remove her furniture from the premises occupied by the plaintiff and to discontinue the utility services on or after March 1, 1950.

The allegation that the defendant wrongfully, wilfully, wantonly and maliciously, between March 2, 1950, and March 13, 1950, actually evicted the plaintiff is not established by the evidence. There is no sufficient proof that the defendant, who had conveyed the property to One Morris, Inc., prior to those dates and was not then its owner, either engaged or participated in or authorized or directed the work of demolishing the dwelling, or removed, or participated in, or authorized or directed, the removal of, or damaged, any of the property of the plaintiff which he left in his room when he departed from the premises on March 2, 1950.

The uncontradicted evidence shows that whatever acts were committed in the demolition of the dwelling and in the removal of the property of the plaintiff, which resulted in loss or injury, were committed by Fike, a subcontractor of C. H. Jimison and Sons, and his agents or employees. Even if Fike and his agent or employees could be considered the representatives of C. H. Jimison and Sons or of One Morris, Inc., they could not, under the evidence, be held to be the agents, the employees, or the representatives of the defendant whose only connection with One Morris, Inc., at that time, was that of the architect for, and a minority shareholder in, that corporation. The evidence fails to show that in either capacity the defendant controlled, influenced, directed, sanctioned or participated in any acts committed or any conduct engaged in by One Morris, Inc., in connection with the demolition of the dwelling or the removal of the property of the plaintiff from the premises. A director or an officer of a corporation does not incur personal liability for its torts merely by reason of his official character unless he has participated in or sanctioned the tortious acts, 13 Am.Jur., Corporations, Sections 1086 and 1087; and a director who is not a party to a wrongful act is not liable for such acts committed by other persons. Smith v. Cornelius, 41 W.Va. 59, 23 S.E. 599, 30 L.R.A. 747. The defendant who was not an officer or a director but a minority shareholder of One Morris, Inc., and who, under the evidence, did not control, influence, direct, sanction or participate in the commission of any acts of the corporation in connection with the demolition of the dwelling or the removal of the plaintiff's property, or act as its agent or employee in dispossessing the plaintiff from the premises formerly occupied by him, can not be subjected to liability for any act of the corporation which might have produced or contributed to that result.

It is also clear, from the evidence, that the defend-

ant did not cause any actual eviction of the plaintiff from the premises. Except in the case of eviction by paramount title, not here involved, the acts of third persons do not constitute an eviction of a tenant unless they are done with the authority, the consent, or the sanction of the landlord, or the landlord fails in the duty resting on him to protect the tenant from such acts or their results. 52 C.J.S., Landlord and Tenant, § 448; 32 Am.Jur., Landlord and Tenant, Section 278. Under the evidence, the plaintiff was dispossessed of the premises by the acts of Fike and his agents and employees and not by any act committed, authorized, sanctioned, or consented to by the defendant who, having previously disposed of the property by conveyance, the validity and the good faith of which are not questioned or challenged, was under no obligation or duty to protect the plaintiff in his continued occupancy of the premises. It is clear, also, that the workmen who demolished the dwelling and removed and damaged the property of the plaintiff, in so doing, did not act maliciously, or wilfully and wantonly, or use unnecessary force, or engage in any violence, or do anything which amounted to a breach of the peace. Regardless of whom they acted for or represented they simply performed, in a peaceable manner, the work they were instructed or directed to perform.

The single instruction offered by the plaintiff and given by the court should have been refused. Though it correctly stated the law, it contained, among other statements relating to damages, the statement that if the jury believed from the evidence that the conduct and the acts of the defendant toward the plaintiff were wanton, wilful and in utter disregard of his rights, the jury, in addition to money loss or actual damages, could also award exemplary damages, which it did in the amount of $1,300. As the evidence failed to disclose that the defendant did anything which deprived the plaintiff of his

possession of the premises, the defendant, under the evidence, could not have been found by the jury to have engaged in any conduct or to have performed any acts which were wanton or wilful or in utter disregard of the rights of the plaintiff. The statement in the instruction relating to conduct or acts of the defendant of that character was not based upon or supported by the evidence, and, for that reason, the instruction was erroneous. Instructions must be based on the evidence and an instruction which correctly states principles of law but which contains a statement which is not based on the evidence is erroneous, Chesapeake & Ohio Railway Company v. Johnson, 134 W. Va. 619, 60 S.E.2d 203; Jones v. Smithson, 119 W.Va. 389, 193 S.E. 802; Penix v. Grafton, 86 W.Va. 278, 103 S.E. 106; Chadister v. Baltimore and Ohio Railroad Company, 62 W.Va. 566, 59 S.E. 523. The giving of such an instruction, when prejudicial to the party objecting, constitutes reversible error. Chadister v. Baltimore and Ohio Railway Company, 62 W.Va. 566, 59 S.E. 523. An erroneous instruction is presumed to be prejudicial and warrants a new trial unless it appears that the complaining party was not injured by the giving of such instruction. Buffington v. Lyons, 71 W.Va. 114, 76 S.E. 129; Ward v. Brown, 53 W.Va. 227, 44 S.E. 488.

The verdict of the jury was fatally defective and should have been set aside by the court of common pleas. As already pointed out the evidence did not justify an award of exemplary damages. The evidence does not show that any of the persons who were engaged in demolishing the dwelling or who removed the property of the plaintiff from it acted maliciously, or wantonly and wilfully, or in utter disregard of the rights of the plaintiff. When it appears, from the facts in evidence, that a jury could not legally award exemplary damages, and it also appears that a verdict included such damages, it is the duty of the trial court, upon proper motion, to set

aside the verdict and grant a new trial. Pegram v. Stortz, 31 W.Va. 220, 6 S.E. 485.

The award of $2,000, as compensatory damages, is also not sustained by the evidence. Ordinarily the proper measure of damages for the loss or the destruction of personal property, other than that which has a peculiar value to its owner, such as an heirloom, or a particular portrait, is the fair market value of the property at the time of its loss or destruction. 15 Am.Jur., Damages, Section 122; 25 C.J.S., Damages, § 83a. See Wiles v. Wiles, 134 W.Va. 81, 58 S.E.2d 601; Pardee v. Camden Lumber Company, 70 W.Va. 68, 73 S.E. 82, 43 L.R.A.,N.S., 262; 169 A.L.R. 1100, Annotations II a, page 1101, and II d, page 1107. In Anotations II a, 169 A.L.R. 1101, in relation to the total destruction of an automobile, the text contains this statement: "Where the automobile is totally destroyed the measure of damage is the market value of the automobile as at the time of destruction." As a general rule the proper measure of damages for injury to personal property is the difference between the fair market value of the property immediately before the injury and the fair market value of the property immediately after the injury, plus necessary reasonable expenses incurred by the owner in connection with the injury. Max Biederman, Inc. v. Henderson, 115 W.Va. 374, 176 S.E. 433; H. B. Agsten and Sons, Inc. v. United Fuel Gas Company, 117 W.Va. 515, 186 S.E. 126; Ripley v. Whitten Transfer Company, W.Va., 63 S.E.2d 626. When, however, the injured property can be restored, by repairs, to the condition which existed before the injury, and the cost of such repairs is less than the diminution of the market value due to the injury, the measure of damages may be the amount required to restore the property to its previous condition. 25 C.J.S., Damages, § 83b.

The evidence introduced in behalf of the plaintiff does not establish the fair market value of the items

of personal property which were lost or stolen or of those which were injured as a result of their removal from the premises occupied by the plaintiff. As to all such articles of personal property, many of which had been owned by the plaintiff for a considerable period of time before they were lost or injured, the plaintiff offered no evidence to establish their market value, but instead testified merely to the value of such articles to him or the cost which he paid for them. Evidence of that character does not prove the market value of the property and was inadmissible. As to the five suits of clothes of the plaintiff, which were lost or stolen, the testimony of the witness who made and sold them to the plaintiff was that they had no commercial value. The damages claimed by the plaintiff as a result of the loss or the injury to his personal property amounted to approximately $600; and because such damages were not proved by competent evidence the jury was not warranted in including them in its award of compensatory damages as it undoubtedly did. The item of property damage of $15 to $25, representing the estimated necessary cost to the plaintiff of repairing the damage done to his wardrobe, and the item of $75 which he paid to investigators for their unsuccessful efforts in undertaking to locate his missing property are shown by the testimony of the plaintiff but are not established against the defendant; and the item of $17.23, representing the excess in the rent which the plaintiff was required to pay for the room at the hotel over the rent of his room in the dwelling after he was dispossessed is clearly not recoverable from the defendant. The damages which resulted from aggravation of the illness of the plaintiff and the humiliation and the embarrassment which he suffered, not being substantial or of long duration, do not justify or sustain the amount of compensatory damages awarded by the jury. A verdict which is clearly in excess of the amount which the evidence shows the plaintiff is justly entitled to recover should be set

aside by the trial court. Drummond v. Cook Motors Lines, W.Va., 67 S.E.2d 337; Thomason v. Mosrie, 134 W.Va. 634, 60 S.E.2d 699; Welty v. Baer, 107 W.Va. 226, 148 S.E. 193. See also Snodgrass v. Charleston NuGrape Company, 113 W.Va. 748, 169 S.E. 406; Thomas v. Lupis, 87 W.Va. 772, 106 S.E. 78; Chafin, Adm'x. v. Norfolk and Western Railway Company, 80 W.Va. 703, 93 S.E. 822.

The defendant complains of the action of the trial court in admitting, over his objection, testimony of the plaintiff that in a conversation with the attorney for the defendant, shortly after the electricity had been disconnected from the premises occupied by the plaintiff, he told the attorney to ask the defendant "to reconnect the electricity in my room" and that the attorney replied "Well, I will ask him, but I am sure he won't do it." Statements or admissions of fact, made by an attorney which are relevant to and are designed to accomplish the purpose of his employment, are regarded as being within the implied authority of the attorney to bind his client and may be admissible in evidence against the client in accordance with the principles which generally govern the relation of principal and agent. 7 C.J.S., Attorney and Client, § 100(b); 31 C.J.S., Evidence, § 361(a). The foregoing rule, however, does not apply to a statement made by an attorney which constitutes a mere expression of opinion. A statement of an attorney must be a statement of fact, rather than an expression of opinion, to be admissible in evidence against his client. 31 C.J.S., Evidence, § 272(b); 22 C.J., Evidence, § 440, page 375. As the statement of the attorney for the defendant, made in his absence and without his knowledge or consent, was a mere expression of opinion, in the nature of a prediction that the defendant would not do a particular act, it was not binding upon the defendant, was inadmissible against him, and should have been excluded by the trial court. A statement of an attorney, made in the absence of his

client and without his knowledge or consent, which constitutes a mere expression of opinion that his client would not do a particular act, is inadmissible in evidence against his client. See 5 Am.Jur., Attorneys at Law, Section 94; State of New Mexico v. Edins, 25 N.M. 680, 187 P. 545, 8 A.L.R. 1331; Atlanta and Lowry National Bank v. Maughon, 35 Ga.App. 25, 131 S.E. 916; 8 A.L.R., Annotation, page 1334.

As the errors heretofore considered and discussed call for reversal of the judgments of the circuit court and the court of common pleas, it is unnecessary to consider or determine whether the plaintiff was guilty of contributory negligence in not protecting his property from loss or injury to which it was subjected, or to consider the instructions offered by the defendant which the trial court refused to give.

The judgment of the Circuit Court of Kanawha County and the judgment of the Court of Common Pleas of Kanawha County are reversed, the verdict is set aside, and this case is remanded to the Court of Common Pleas of Kanawha County for a new trial which is hereby awarded the defendant.

Judgments reversed, verdict set aside, case remanded.

ORDERS OF COURTS BELOW

(STATE OF WEST VIRGINIA,

At a Court of Common Pleas for Kanawha County held at the Court House thereof on the 21st day of July, 1953.)

Henry S. Cato,

Vs. ——— : ——— Trespass on the Case No. 4209.

Cyrus E. Silling, Sr.

1. Heretofore, on July 1, 1953, came the plaintiff in person and by his counsel, and came also the defendant in person and by his counsel, and announced ready for trial.

2. Thereupon came a jury, to-wit, Otha Stricklen and eleven other good and lawful men, selected by lot, duly chosen, impaneled and sworn, to well and truly try the issue joined between the plaintiff and defendant, and a true verdict render according to the law and the evidence.

3. At the conclusion of the plaintiff's evidence in the case the defendant moved the Court to strike the plaintiff's evidence and direct the jury to bring in a verdict for the defendant, assigning several grounds therefor. And the Court, having maturely considered the points raised by the defendant's said motion, together with the arguments of counsel thereon, was of opinion to, and did, sustain the same.

4. The Court thereupon instructed the jury to find a verdict for the defendant, which they did in the following words:

> "We, the jury, at the direction of the Court, find for the defendant.
>
> /s/ Otha Stricklen, Foreman"

5. The plaintiff, by his counsel, objected to the granting of the said motion and saved timely exceptions thereto.

5A The Plaintiff moved the court to set aside the verdict and grant him a new trial, which motion the court overruled and to which ruling plaintiff objected and excepted.

6. It is, accordingly, ordered that the plaintiff recover nothing of and from the defendant by his said suit and

that the said defendant to recover of and from said plaintiff his costs in and about his defense in this behalf expended, including an attorney's fee of Ten Dollars ($10.00) as provided by law.

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Court of Common Pleas for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 22nd day of January, 1955.

M. H. HIX, CLERK,

COURT OF COMMON PLEAS, KANAWHA

COUNTY, WEST VIRGINIA.

(STATE OF WEST VIRGINIA,

At a Circuit Court for Kanawha County held at the Court House thereof on the 18th day of March, 1954.)

Henry S. Cato,

v. ..... : ..... Trespass on the Case No. 4209.
Cyrus E. Silling, Sr.

It appearing to the court that heretofore the plaintiff, Henry S. Cato, filed his petition, together with the record and a note of argument in support of said petition, praying for a writ of error to a final judgment of the Court of Common Pleas of Kanawha County rendered and entered on the 21st day of July, 1953, after due consideration of said petition and record the Court is of opinion to, and does, hereby refuse to grant the prayer of said petition, and it is hereby ordered that the writ of error prayed for be, and the same is, hereby refused and denied.

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Court of Common Pleas for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 22nd day of January, 1955.

M. H. HIX, CLERK,
CIRCUIT COURT, KANAWHA
COUNTY, WEST VIRGINIA.

STATE OF WEST VIRGINIA:

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 27th day of September, 1954, the following order was made and entered, to-wit:

Henry S. Cato

vs.

Cyrus E. Silling, Sr.

On a former day, to-wit, June 30, 1954, came the petitioner, Henry S. Cato, by J. Campbell Palmer, III, his attorney, and presented to the Court his petition praying for a write of error to a judgment of the Circuit Court of Kanawha County rendered in this case on the 18th day of March, 1954, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the writ of error prayed for is refused.

A True Copy.

Attest: KENNETH E. HINES,
Clerk Supreme Court of Appeals.

STATE OF WEST VIRGINIA:

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 22nd day of November, 1954, the following order was made and entered, to-wit:

Henry S. Cato

vs.

Cyrus E. Silling, Sr.

On a former day, to-wit, October 12, 1954, came again the petitioner, Henry S. Cato, by J. Campbell Palmer III, his attorney, and presented to the Court his petition praying for a writ of error to a judgment of the Circuit Court of Kanawha County rendered in this case on the 18th day of March, 1954, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the writ of error prayed for is refused on this second application.

A true copy.

Attest: KENNETH E. HINES,
Clerk Supreme Court of Appeals.

PLACE WHERE FEDERAL QUESTION FIRST RAISED

BE IT REMEMBERED that heretofore, to-wit, on Wednesday, the first of July, 1953, on the trial of the above-styled case, before the jury had been duly impaneled and sworn, the following proceedings were had in the Court's chambers:

> "MR. FISHER: May it please the Court, your honor will recall that on two previous occasions this case has come on for hearing in this court, and that at both trials the plaintiff has relied heavily upon his allegation that the defendant, during the

period from March 1, 1950, to March 13, 1950, evicted the plaintiff from the premises occupied by the plaintiff, in violation of an Act of Congress known as the Housing and Rent Act of 1947, its amendments then in effect, and certain rules and regulations promulgated under that statute. The plaintiff himself, in one of his statements from the witness stand, compared the defendant with Adolph Hitler, in an obvious effort to prejudice the jury against the defendant by picturing him as an unprincipled person who did not hesitate to violate the laws of the United States.

"Upon an appeal taken in this cause to the Supreme Court of Appeals of this State, the validity of the plaintiff's said accusation has been considered by that Court, and in the Syllabus 1 of its decision, dated December 16, 1952, and reported under the style of *Cato* vs. *Silling, 73 S.E. 2nd 731,* disposed of the matter in these words:

" 'The Housing and Rent Act of 1947, Chapter 163, 61 Stat. 193, as amended by the Act of March 30, 1948, Chapter 161, 62 Stat. 93, and the Act of March 30, 1949, Chapter 42, 63 Stat. 18, 50 U. S. C. A., Appendix, Sections 1881 to 1910, in effect in March, 1950, did not provide any civil remedy, or create any cause of action, for the recovery of damages by the tenant for his wrongful eviction by his landlord from premises occupied by such tenant.'

"At Page 740 of the same decision, the following sentence appears, 'A decree, or any matter of a decree, which has no matter in the pleading to rest upon is void, because pleadings are the very foundation of judgments and decrees.'

"And, further, at Page 743: 'It follows that the allegations of the declaration which base the claim of the plaintiff to recover damages for the alleged wrongful eviction of the plaintiff upon a violation

by the defendant of the order of the Area Rent Director of January 19, 1950, do not set forth a cause of action against the defendant.'

"In an effort to avoid the introduction of prejudical error into the present proceeding and to facilitate the disposition of this controversy in compliance with directives specifically set forth in the aforesaid decision of our Court of last resort, the defendant moves that the plaintiff's counsel and the plaintiff himself, inasmuch as he is an attorney duly licensed to practice as such before the Bar of this Court, now be directed by Your Honor to avoid any mention of or reference to the Housing and Rent Act of 1947, as amended, and in effect before, during or since March, 1950, in their opening to the jury or in any of the evidence produced by them or in their behalf. Inasmuch as such mention or reference can have no legal bearing under the aforesaid decision on the matter here at issue, it must be obvious that the introduction thereof by the plaintiff or in his behalf can have as its sole and only purpose the stimulation of a prejudice and passion against the defendant which is wholly unwarranted in fact, and has been specifically condemned in this case.

"MR. LOPINSKY: Your Honor, we think that motion is highly improper and ought to be overruled, for these reasons. In the first place, we want to make a record and certainly intend to make a record, so that in the event this Court would hold in strict conformity with the ruling of the Supreme Court on that particular point, we might make a record so that we can go to the Supreme Court of the United States.

"THE COURT: You can make your record, but I am bound by this: 'It follows that the allegations of the declaration which base the claim of the plaintiff to recover damages for the alleged

wrongful eviction of the plaintiff upon a violation by the defendant of the order of the Area Rent Director of January 19, 1950, do not set forth a cause of action against the defendant.'

"MR. LOPINSKY: Yes, your Honor, except this. We are entitled to show his ignoring of that for the purpose of getting to the feeling of this defendant towards this plaintiff in order to get him out of this property, going to the question of eviction.

"THE COURT: I will let you make a record, of course, but I am not going to permit testimony which the Supreme Court of Appeals has told me is not based on any proper cause of action. You are not going to get indirectly what you can't get directly. I am not going to permit that.

"MR. LOPINSKY: Your Honor, we feel we are certainly entitled to show that there were such rulings.

"THE COURT: It is not a jury question. You can vouch the record and make your record, and I want you to have a record, but, Mr. Lopinsky, you understand it says: 'It follows that the allegations of the declaration which base the claim of the plaintiff to recover damages for the alleged wrongful eviction of the plaintiff upon a violation by the defendant of the order of the Area Rent Director of January 19, 1950, do not set forth a cause of action against the defendant.' Now, if it does not set forth a cause of action, I think it of necessity must follow that no evidence should be introduced on it.

"I will sustain the objections at the time they are made, and I want counsel to understand that I do not want any violation of this, because I think that is a federal question.

"MR. LOPINSKY: We want to arrange our record for that.

"THE COURT: You understand I am not going to let go to the jury that which the Court says I can't do and which I do not think is proper. They say in this opinion, as I read it, that the declaration sufficiently states a cause of action for the unlawful eviction of your plaintiff by the defendant. Off the record.

(Whereupon there was discussion off the record."

"THE COURT: On the record. The Court has stated to counsel, out of the hearing of the jury, what my views are and I expect counsel to adhere to them. I overrule your motion as made at this time.

(Exception.)"

Here the plaintiff rested his case. The Court and counsel retired to the Court's chambers, and the following proceedings were had.

* * *

"THE COURT: You may make your motion.

"MR. SCHAFFER: The defendant moves the Court to strike the evidence of the plaintiff and instruct the jury to return a verdict for the defendant, and assigns the following grounds for such motion:

"(1) The plaintiff has totally failed to prove a cause of action against the defendant;

"(2) The plaintiff has failed to prove the defendant committed any unlawful act which would make the defendant liable to the plaintiff for an unlawful eviction;

(Six other grounds were cited by defendant which are not pertinent to the present issue).

* * *

"(Whereupon there was discussion and argument off the record.)

"The COURT: Gentlemen, reluctant as I am to do it, I do not understand that any evidence introduced for and on behalf of the plaintiff in this case is sufficient to take this case from without the doctrine and language of the opinion of the Supreme Court, which we have been discussing.

"MR. LOPINSKY: I want this in the record. Does the Court hold that, based upon the Supreme Court's opinion, there is no cause of action by reason of any breach of the Federal regulation?

"THE COURT: I am holding that there has been, in my opinion, no evidence introduced for or on behalf of the plaintiff which changes the basic reasons, as set forth in the Supreme Court's opinion.

"MR. LOPINSKY: Now, as I understand that, your Honor, the Court accepts the Supreme Court opinion—which it has to do, of course—that the violation of the Federal statute creates no right of action?

"THE COURT: I do so hold, as the Supreme Court so held, that the Act 'did not provide any civil remedy or create any cause of action for the recovery of damages by a tenant who was wrongfully evicted by his landlord.'

"I repeat that I do so most reluctantly, but I feel impelled, as I view the evidence—and I certainly tried to be as liberal as I could—to sustain the defendant's motion.

"(To which ruling and action of the Court the plaintiff, by his counsel, then and there duly objected and excepted.)

"(Thereupon the Court and counsel returned to the courtroom and proceedings within the hearing and presence of the jury were resumed, as follows:)

"THE COURT: Gentlemen of the jury, a proper motion has been made to the Court which I am impelled to act upon, as I see the law in this case; and under the law, as announced by the Supreme Court in this case recently before it on a former trial, and in connection with the facts presented here, I am of the opinion that I must sustain that motion to direct a verdict in this case for the defendant. This is your verdict, under the direction of the Court. One of you will please sign that verdict.

"(Whereupon one of the jurors signed said verdict, being in the words, as follows: 'We, the jury, at the direction of the Court, find for the defendant. (signed)

'Otha Stricklen, Foreman.')"

EXCERPTS FROM PETITION FOR WRIT OF ERROR TO CIRCUIT COURT OF KANAWHA COUNTY

Your petitioner says that the Court of Common Pleas of Kanawha County, West Virginia, erred to his prejudice in the following respects, among others:

1. It was error to hold and adjudicate that (a) the Housing and Rent Act of 1947, Chapter 163, 61 Stat. 193, as amended by the Act of March 3, 1948, Chapter 161, 62 Stat. 93, and the Act of March 30, 1949, Chapter 42, 63 Stat. 18, 50 U. S. C. A., Appendix, Sections 1881 to 1910, did not provide any civil remedy or create any cause of action for the recovery of damages by the tenant for his wrongful eviction by his landlord from premises occupied by such tenant; and (b) that the allegations of the declaration which base the claim of the plaintiff to recover damages for the alleged wrongful eviction of the plaintiff upon the violation by the defendant of the order of the Area Rent Director on January 19, 1950, do not set forth a cause of action against the defendant.

2. It was error to so interpret, construe and apply said Act of Congress (hereinafter, for brevity, called the "Housing Act") as to deprive plaintiff and petitioner of his property without due process of law, in contravention and violation of the Fourteenth Amendment to the Constitution of the United States.

3. It was error to so interpret, construe and apply said Housing Act as to deprive plaintiff and petitioner of his property without due process of law, in contravention and violation of Article 3, Section 10, of the Constitution of the State of West Virginia.

4. It was error to so interpret, construe and apply Chapter 37, Art. 6, Section 5 (Michie's Code, §3655), Chapter 50, Art. 11, Sections 1, 2, 3, 4, 6 and 7, Code of 1931 as amended, as to deprive the plaintiff of his property without due process of law, in contravention and violation of Art. 3, Section 10, of the Constitution of West Virginia.

5. It was error to refuse to hold and adjudge that plaintiff had a right of action against the defendant under and by virtue of Chapter 55, Art. 7, Section 9, of Code, 1931, as amended (Michie's Code, §5478).

* * *

10. It was error to strike out plaintiff's evidence, and direct the jury to find a verdict for the defendant, upon the grounds, or any of them, assigned by the defendant for so doing, or upon any ground or for any reason.

* * *

EXCERPTS FROM PETITION FOR WRIT OF ERROR TO SUPREME COURT OF APPEALS OF WEST VIRGINIA

Questions Presented

1. Did a right of action accrue to plaintiff because of defendant's violation of Federal Rent and Housing Act?

2. If the Court holds such right of action did not arise, does this not violate plaintiff's rights and privileges guaranteed by the Federal and State Constitutions?

* * *

4. Did not a violation of the Federal Rent Act, which was superimposed upon the rent law of West Virginia, give plaintiff a right of action under the common law of this state, when he proved that as a direct and proximate result of the violation of such law he suffered injury and damage?

* * *

6. By directing a verdict against plaintiff, did the lower court deprive him of his rights and privileges guaranteed by the Federal and State Constitutions?

MAR 18 1955
HAROLD B. WILLEY, Clerk

No. 609

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

HENRY S. CATO, PETITIONER

v.

CYRUS E. SILLING, SR., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION

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Counsel for Respondent

HOOD HIBERNIAN CO., CHARLESTON, W. VA.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Supreme Court of Appeals of West Virginia prepared no opinion following the appeal of this, the third trial of this case. Its opinion following an appeal after the second trial of this cause is reported at ——— W. Va. ———, 73 S. E. 2d 731. The findings of fact and conclusions of law of the trial court are not reported but are included in the Appendix to the Petition at pages 45-49.

JURISDICTION

The original judgment of the Supreme Court of Appeals of West Virginia remanding this cause to the trial court was entered on December 16, 1952; a retrial was had on July 1, 1953, which resulted in a directed verdict for respondent; the said Supreme Court of Appeals refused to review on September 27, 1954, and again on November 22, 1954. The Petition for a Writ of Certiorari was filed on February 21, 1955. Jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED

This litigation was instituted as an action of Trespass on the Case in the Court of Common Pleas of Kanawha County, West Virginia, by petitioner, a subtenant, for damages for his alleged unlawful eviction by respondent from premises formerly owned by respondent. The question presented is whether the Supreme Court of Appeals of West Viginia correctly held that "The Housing and Rent Act of 1947, Chapter 163, 61 Stat. 193, as amended by the Act of March 30, 1948, Chapter 161, 62 Stat. 93, and the Act of March 30, 1949, Chapter 42, 63 Stat. 18, 50 U. S. C. A. Appendix, Sections 1881 to 1910, in effect in March, 1950, did not provide any civil remedy or create any cause of action for the recovery of damages by a tenant for his wrongful eviction by his landlord from the premises occupied by such tenant". (This question does not coincide with those presented by petitioner as reasons for granting certiorari because petitioner's questions presented assume facts, such as petitioner's status as a tenant and his unlawful eviction by respondent, which allegations were rejected in toto by a unanimous court below.)

STATUTES INVOLVED

The pertinent provisions of the Housing and Rent Act are set forth in the Appendix to the Petition, page 1-4.

STATEMENT

Petitioner began this action of Trespass on the Case on March 3, 1950, by a complaint seeking damages for his unlawful eviction by respondent from a single sleeping room occupied by petitioner as a month to month tenant (R. 24) of his landlady, one Clara Williams Allen; the dwelling in which the said room was located had been previously leased by respondent, its former owner, to the said Allen as a tenant from month to month (R. 173). Petitioner, in the second trial in the trial court, obtained a judgment for $3,300.00, of which the jury designated $2,000.00 as compensatory damages and $1,300.00 as punitive damages. The respondent appealed that judgment, via the Circuit Court of Kanawha County, West Virginia, to the Supreme Court of Appeals of West Virginia, which Court reversed the trial court and remanded the cause for a new trial. *Cato v. Silling,* ——— W. Va. ———, 73 S. E. 2d 731. At the conclusion of petitioner's evidence on the third trial, the trial court held that, under the previous decision of the Supreme Court of Appeals (R. 196), petitioner had again failed to make a case against respondent, and he directed a verdict in respondent's favor. The resulting judgment was appealed to the Supreme Court of Appeals of West Virginia, but that Court twice refused to hear it. The present application for a Writ of Certiorari followed.

During the years 1945 to 1949, both years inclusive, the respondent, Silling, was the owner of a dwelling house and lot at 1216 Kanawha Boulevard, East, in the City of Charleston, West Virginia. (R. 149, 172) During those years he leased the entire property to Clara Williams Allen, who operated a rooming house thereon. Tenant Allen held the property as lessee under a written lease from respondent Silling's predecessor in title which expired in 1944 and thereafter she held over as a month to month tenant under an oral agreement with respondent. (R. 173) Petitioner

Cato was a month to month subtenant of tenant Allen and occupied a sleeping room at the said address prior to and on January 9, 1950. (R. 24, 79, 184) At no time, either before or since that date, did petitioner ever have any contract, lease or agreement of any kind with respondent regarding the renting of the said room (R. 150), nor did petitioner at any time ever pay or offer to pay any rent for the said room to respondent or to any of respondent's agents. (R. 87, 88)

The chronological sequence of events after January 9, 1950, may be set down as follows:

ITEM	DATE	EXPLANATION
1.	1-9-50	Petitioner Cato was a month to month subtenant of Clara Williams Allen, lessee, and occupied a sleeping room at 1216 Kanawha Boulevard, East, Charleston, Kanawha County, West Virginia. (R. 24, 79, 184)
2.	1-9-50	Respondent Silling leased the entire premises at 1216 Kanawha Boulevard, East, Charleston, West Virginia, to the said Allen on a month to month basis and never at any time had any dealings with petitioner. (R. 88, 173)
3.	1-9-50	Respondent Silling, owner of the property at 1216 Kanawha Boulevard, East, Charleston, West Virginia, filed with Office of Housing Expediter a petition seeking permission to demolish the dwelling thereon. (P. Ex. 2, R. 53, 56)
4.	1-11-50	Tenant Allen filed with the Office of Housing Expediter at Charleston, West Virginia, a petition wherein she requested permission to remove all her furniture and fixtures at the premises at 1216 Kanawha Boulevard, East, and to disconnect, on or after March 1, 1950, all

ITEM	DATE	EXPLANATION
		utilities supplied by her at the said address, her petition stating that she had made arrangements to vacate the said property before March 1, 1950. (P. Ex. 5, R. 183)
5.	1-17-50	Respondent Silling served on his tenant Allen a notice to vacate effective 2-19-50. (R. 152)
6.	1-19-50	Respondent Silling's petition (Item 3) was refused by Office of Housing Expediter and eviction proceedings were forbidden until 4-11-50. (P. Ex. 3, R. 58)
7.	1-19-50	Tenant Allen's petition (Item 4) for permission to remove her furniture and fixtures from the said premises and to disconnect all her utilities on or after March 1, 1950, was approved and an order was issued by the said Expediter authorizing her removal of the said furniture and disconnecting the said utilities from the said premises on or after March 1, 1950. (P. Ex. 5, R. 140, 142) Petitioner Cato appeared at the Office of Housing Expediter and opposed the prayer of Allen's said petition. However, the Housing Expediter overruled petitioner Cato's objections and issued the aforesaid order.
8.	1-20-50	Copy of Office of Housing Expediter order (Item 7) received by Petitioner Cato (P. Ex. 3, R. 58)
9.	1-20-50	Tenant Allen served a notice to vacate on petitioner Cato and other subtenants effective 2-28-50. (R. 29, 31, 39, 77)
10.	2-20-50	Tenant Allen moved from the premises at 1216 Kanawha Boulevard, East, taking all her furniture and fixtures, except items withheld by petitioner Cato. All subtenants moved except petitioner Cato. (R. 81, 83, 179)

ITEM	DATE	EXPLANATION
11.	2-21-50	Respondent Silling sold the property at 1216 Kanawha Boulevard, East, to One Morris, Inc. (P. Ex. 4, R. 96, 108, 113)
12.	3-2-50	Petitioner Cato took other quarters but left a few personal belongings in premises at 1216 Kanawha Boulevard, East. (R. 25, 171)
13.	3-3-50	All utilities disconnected at 1216 Kanawha Boulevard, East. (R. 85, 179)
14.	3-6-50	Demolition of the premises was begun by Virgil Fike House Moving Company under a contract with C. H. Jimison and Sons, General Contractors, of Huntington, West Virginia, who held a construction contract with One Morris, Inc., owner of the premises. (R. 90, 122, 128, 145, 146)
15.	5-3-50	Suit filed by petitioner Cato against respondent Silling, alleging damages, etc.

ARGUMENT

A diligent search of the record in this case fails to disclose a single issue which meets traditional criteria for review by certiorari. The unanimous decision of the Supreme Court of Appeals of West Virginia on one of the non-federal questions involved, namely, that respondent was not the person who "evicted plaintiff from the premises" and neither did he participate "in any acts or conduct which caused plaintiff to leave the premises on March 2, 1950" is dispositive of the case, *Fry Roofing Co. v. Wood,* 344 US 157, 160, 97 L. Ed. 168, 171-172, and obviously does not present a question for review by this Court; further, the fact that the federal statute concerned here is no longer in effect (it having been subsequently amended by Act of July 31, 1951, Chapter 275, Title II, Section 204, 65 Stat. 147, 50 U. S. C. A. Appendix, Section 1895, and later repealed by

the Act of April 30, 1953 and Ex. Ord. No. 10475, August 3, 1953, 18 F. R. 4537) removes whatever need there once may have been for a difinitive decision on the point by this Court.

I

THE DECISION BELOW IS CLEARLY CORRECT

In the words of the court below, (App. to Pet. p. 20)

> "There is little, if any, conflict in the material facts disclosed by the evidence, and the only facts as to which the evidence is conflicting are relatively unimportant."

Although petitioner describes himself as a "tenant", both in his "Questions Presented" and in his "Reasons for Granting the Writ", the facts are undisputed that at no time was he ever a tenant of respondent (R. 87), at no time did he ever pay or offer to pay any rent to respondent (R.88) and, consequently, he never achieved that status with respect to respondent. Further, he speaks of a "willful and direct violation of the Act" and "the admittedly wrongful act". In the trial court the respondent specifically denied any violation of the Housing and Rent Act and further denied any wrongdoing whatever; the court below unanimously said (p. 739, App. to Pet. p. 26):

> "There is no direct or positive evidence that the defendant (respondent) evicted the plaintiff (petitioner) from the premises or participated in any acts or conduct which caused the plaintiff to leave the premises on March 2, 1950",

and further (p. 744, App. to Pet. p. 37):

> "The contention of plaintiff (petitioner) that he was constructively evicted from the premises by the defendant on March 2, 1950 . . . . is wholly devoid of merit",

and again (p. 745, App. to Pet. p. 38, 39):

> "The allegation that the defendant wrongfully, wilfully, wantonly and maliciously, between March 2, 1950,

> and March 13, 1950, actually evicted the plaintiff is not established by the evidence . . . . The uncontradicted evidence shows that whatever acts were committed in the demolition of the dwelling and the removal of the property of plaintiff (petitioner) which resulted in loss or injury were committed by Fike, a subcontractor of C. H. Jimison and Sons, and his agents or employees . . . They could not, under the evidence, be held to be the agents, the employees or the representatives of the defendant (respondent) . . . . "

After three strongly contested jury trials, it is unlikely that petitioner will be able to present anything in the way of additional or different evidence on a fourth trial. These are findings of fact on a non-federal question with ample evidence to support them; it necessarily follows that this cause does not present a proper subject for the exercise of Supreme Court jurisdiction.

Milk Wagon Drivers U. v. Meadow Moor Daries, 312 US 287, 294, 85 L. Ed. 836, 841

Stein v. New York, 346 US 156, 181, 97 L. Ed. 1522, 1540

Herb v. Pitcairn, 324 US 117, 125-126, 87 L. Ed. 789, 794

II

THERE IS NO CONFLICT OF DECISION

Petitioner asserts that there is a complete divergence and conflict of opinion in the state and lower federal courts concerning whether a violation of a federal statute, such as the Federal Housing and Rent Act, gives rise to a common law right of action. To the contrary, respondent asserts that the highest courts of Connecticut, *Blanchard v. Nichols,* 135 Conn. 391, 64 A. 2d 878; Massachusetts, *Kilroy v. Barron,* 326 Mass. 464, 95 N. E. 2d 190; Minnesota, *Behrendt v. Rassmussen,* ——— Minn. ———, 47 N. W. 2d 779; New York, *Rosenblatt v. Sackadorf,* 298 N. Y. 761, 83 N. E. 2d 158; and Pennsylvania, *Crawford v. Pituch,* 368 Pa. 489,

84 A. 2d 204, as well as lower courts in Ohio, *Harrison v. Webb,* ——— Ohio ———, 100 N. E. 2d 728, and two federal courts *Leidy v. Connor,* 70 F. Supp. 1022, and *Fleming v. Pasternack,* 71 F. Supp. 821, have all held that no recovery for wrongful eviction under the Housing and Rent Act as in effect in March, 1950, may be had by a tenant, much less a subtenant, against his landlord. The 1951 amendment of the Act would indicate that Congress was of a like opinion. Although the basic Housing and Rent Act first became effective in 1942, and similar legislation remained on the books until 1951, petitioner cites no contrary holdings in a factual context similar to the one at bar; and inasmuch as the statute here involved has now been repealed, and federal rent control no longer exists, the possible future appearance of such a controversy is hardly a matter of such urgency as to warrant the attention of this Court at this time.

III

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

This is fundamentally a small civil dispute between two private litigants over a matter which is personal to them and to no one else. The mere listing of remote possible analogies does not make an important federal question. Petitioner provides no citation to any pending litigation; he points to no instance where the problem here involved was deemed sufficiently important during the lifetime of the statute concerned to warrant the consideration of this Court. It is believed that his present attempt to do so after its death comes too late.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. B. Fisher,
Counsel for Respondent

8 March 1955

APR 20 19
HAROLD B. WILLEY

No. 609

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

HENRY S. CATO, PETITIONER

v.

CYRUS E. SILLING, SR., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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No. 609

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

HENRY S. CATO, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Henry S. Cato, petitioner, prays that this Court grant a rehearing of its Order of April 4, 1955, denying his petition for a writ of certiorari, and that a writ of certiorari issue to reverse the judgment of the Supreme Court of Appeals of West Virginia in the above-entitled case as prayed for in the petition filed February 21st 1955 herein.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

1. Petitioner's counsel received only one copy of the brief in opposition, and petitioner, himself an attorney, received no copy of it until March 30. Immediately upon such receipt, petitioner requested his counsel to prepare a reply to it. Counsel prepared this reply, and petitioner in person had just completed proof-reading it with the printer, and turned it over to the latter, on April 4, 1955, when the telegram from the Clerk to his counsel announced the refusal of the certiorari. However, petitioner in person directed the printer to complete the brief and to mail it to the Clerk of this Court, and it was so mailed on Tuesday, April 5.

This Court acted before the reply to the brief in opposition was submitted, and it was returned as being filed too late. The reply to the brief in opposition was very petinent to the issue in this case, and set forth the following argument;

"Respondent's brief in opposition, particularly on page 7 thereof, challenges petitioner's being a tenant of respondent, and the entire brief is based upon that premise.

At page 3 of the statement of respondent, it is stated:

> "During those years, he (respondent) leased the entire premises to Clara Williams Allen, who operated a rooming house thereon. Tenant Allen held the property as lessee under a written lease from respondent Silling's predecessor in title."

At page 12 of the Appendix to the Petition for Certiorari is quoted an excerpt from Controlled Housing Rent Regulations, Housing Evictions, April 1, 1949, in effect during the period in question, under sub-paragraph (g), heading Exceptions; "The provisions of this section do not apply to ** (1) Sub-Tenants:

> "A sub-tenant or other person who occupies or occupied under a rental agreement with the tenant, where removal or eviction of the sub-tenant or other such occupant is sought by the landlord of the tenant, *unless the rental agreement between the landlord and tenant contemplated the sub-letting by the tenant of the entire accommodations or substantially all of the individual units therein* ***. "

The original record before the Court shows conclusively that the entire premises were leased by the landlord to the tenant Allen.

The above-quoted statement from respondent's opposition brief admits the entire premises were leased.

Therefore, under the Housing Regulations as above-quoted, since the rental agreement between the landlord and tenant Allen did contemplate the sub-letting by the tenant Allen of the entire accommodations and the record shows that such was the fact, the entire argument of respondent that the necessary relationship did not exist must fail.

Again at page 5 of respondent's brief, it is stated: "All sub-tenants moved except petitioner Cato." The reply brief further admits that the Housing Expediter served notice on the sub-tenants, including petitioner Cato, of the actions before the Housing Expediter.

Therefore, it is respectfully submitted that since the entire reply brief is based upon an erroneous assumption of law, it should not be held by this Court to be effective, but petitioner's original brief should, therefore, stand unchallenged."

2. The reason the reply to the brief in opposition is of particular importance is because of the case of *Ewing vs. Coal and Coke Ry. Co.*, 82 W. Va. 427, 96 S. E. 73, in which this Court denied certiorari (247 U. S. 521), wherein the Supreme Court of Appeals of West Virginia held:

> "Though the Federal Safety Appliance Act of March 2, 1893, as amended March 2, 1903, and April 14, 1910, contains no express language conferring a right of action for the death or injury of an employe occasioned by a failure to comply with its requirements, a right of action therefor, nevertheless, is within the contemplation and intendment of the Act."

We submit that holding in a Federal question is at complete variance with the holding in the instant case, which merits a review by this Court.

CONCLUSION

For the reasons set forth above and in the petition for certiorari, it is respectfully submitted that a rehearing should be granted, and that upon such rehearing a writ of certiorari should issue to the Supreme Court of Appeals of West Virginia.

Respectfully submitted,
J. CAMPBELL PALMER III,
Counsel for Petitioner

CERTIFICATE OF COUNSEL:

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, as delay would avail petitioner nothing and would not harm respondent, and is restricted to grounds specified in Rule 33 of the Rules of this Court.

J. CAMPBELL PALMER III,
Counsel for Petitioner

SERVICE:

I hereby certify that service of this petition to Rehear was made by delivering copies thereof to counsel for respondent at his office, 705 Kanawha Valley Building, Charleston, West Virginia, on the 19th day of April, 1955.

Respectfully submitted,

J. CAMPBELL PALMER III
Counsel for Petitioner